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New York (City) Courts

THE MISCELLANEOUS REPORTS.

CASES DECIDED

IN THE

COURTS OF RECORD

OF THE

STATE OF NEW YORK

OTHER THAN THE

Court of Appeals and the Appellate Division of the Supreme Court,

INCLUDING

THE APPELLATE TERM OF THE SUPREME COURT FOR THE HEARING OF APPEALS FROM THE CITY COURT OF THE CITY OF NEW YORK FOR THE BOROUGHS OF MANHATTAN AND THE BRONX AND THE MUNICIPAL COURTS OF THE CITY OF NEW YORK FOR THE BOROUGHS OF MANHATTAN AND THE BRONX; SPECIAL TERMS AND TRIAL TERMS OF THE SUPREME COURT, CITY COURT OF THE CITY OF NEW YORK, THE COURT OF GENERAL SESSIONS OF THE PEACE IN AND FOR THE CITY AND COUNTY OF NEW YORK, COUNTY COURTS, AND OF THE SURROGATES' COURTS, IN PURSUANCE OF LAWS OF 1892, CHAPTER 598.

ROBERT G. SCHERER, REPORTER.

VOLUME XL.

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THE

MISCELLANEOUS REPORTS

OF THE

STATE OF NEW YORK.

COMMENCING FEBRUARY, 1903.

GEORGE A. KENT, an Abutting Owner on Court Street, a Taxpayer in the City of Binghamton, New York, Plaintiff, *v.* THE COMMON COUNCIL OF THE CITY OF BINGHAMTON and THE BINGHAMTON RAILROAD COMPANY, Defendants.

(Supreme Court, Broome Special Term, February, 1903.)

Railroad corporation — Lapse of an option to construct — Illegal gift by a municipality to the railroad of a part of the cost of paving a street.

A street railroad corporation must be deemed to have lost an option to construct a railroad in a city street where many years, since the last extension of the option, passed without action upon its part, where it stood by and let another railroad corporation acquire the franchise in the street, where, when, seven years later, it merged that corporation into its own, it operated that portion of the road under the purchased franchise until it reconstructed that portion, and where it procured the consent of the municipality to such construction.

Where a street railroad corporation is legally bound to pave between its tracks and for two feet on either side of them, the municipality has no right or power to agree with the corporation that it shall be liable to pay only one-fifth of the expense of such paving.

The consolidations which resulted in the existing Binghamton Railroad Company and the contract made between the city of Binghamton and two of the constituent companies did not relieve the Binghamton Railroad Company from its statutory liability to pay the entire expense of paving, on East Court street in said city, between its tracks and for two feet outside of them.

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Action by a taxpayer.

Carver & Deyo, for plaintiff.

Curtiss, Arms & Keenan, for defendants.

Forbes, J. This action has now been tried three times. Two former decisions and judgments have been reversed by the Appellate Division. This is the third trial.

This is an action brought by a taxpayer of the city of Binghamton, to restrain the enforcement of a tax levied by said city for paving a portion of Court street, known as the "East End," upon which the Binghamton Railroad Company now operates a double track, surface trolley road.

In 1868 what was then known as the Port Dickinson & Binghamton Railroad Company obtained a charter, under chapter 501 of the Laws of 1868, to construct and operate a surface street railroad between Port Dickinson and the city of Binghamton. This railroad was constructed and operated under said franchise and charter along and upon certain streets in said city, including that portion of Court street running westerly from Chenango street. That charter and the franchise given under it by the city provided for the construction and operation of said road upon and along other portions of the streets in said city, including the eastern portion of Court street, covering the *locus in quo*. That charter provided that said company might exercise the option to commence to build and extend said road, at any time within five years from the granting of said charter. Laws of 1871, chap. 379, § 2. This legislative enactment extended to and covered the year 1872. Said company did not thereafter construct or operate any surface road upon Court street, east of Chenango street. Nor was the time for the construction of said railroad further extended by the Legislature. The company continued to operate its cars upon the surface line, so built by it, down to the year 1894, without in any manner acting upon or accepting the original option given to it to lay its tracks upon East Court street, along and upon the *locus in quo*. It is claimed, on the part of the plaintiff, that the building of said company's line, upon that portion of Court street was abandoned.

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In the year 1886, what is known as the Court Street & East End Railroad Company applied for a charter and it was granted a franchise by the city to run and operate a street railway upon the surface of East Court street to the city limit. The operation of this road continued without interference, on the part of the defendant company, until 1894, when the defendant company purchased the stock of the Court Street & East End Railroad Company, and consolidated that road with other previously acquired roads into what, since that time, has been known as "The Binghamton Street Railroad Company"; tearing up the old tracks of the East End Company and constructing a double track, surface line, to be operated under the trolley system. This was done upon and under the petition of said consolidated company, with the consent of the common council of said city, whose engineer, to some extent at least, superintended the construction of said consolidated surface railroad, directing the manner in which said construction should be made; the kind of rails and ties to be used thereon; and the same was built as a trolley system, and said road was in operation at the time this action was commenced. The defendant city reserved to itself certain privileges which were provided for in a certain contract made for the construction of said road and the erection of the trolley poles upon and along said street.

The question in this action arises over the paving of said street, covering the *locus in quo*. The defendant company now claims that, under its original charter, the franchise granted to it and the contract so made with it, by the other defendant, the city of Binghamton, defendant company is exempt from paving between its tracks and two feet each side thereof.

The defendant company admits that under its contract, charter, and franchise, it is liable to pay one-fifth of the value of said pavement on Court street, at the *locus in quo*. It now claims to be operating said trolley line under its original charter and franchise, under the contract with, and the consent of, the defendant, the city of Binghamton. The defendant company also claims that its purchase of and the consolidation with the Court Street & East End Company were merely consummated for the purpose of taking to itself the operation of said railroad, upon and over the *locus in quo*, under the defendant company's original charter. There is no question that, if said defendant company is so operat-

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ing and running said road, it is then exempt from the expense of said additional paving.

In 1884, prior to the construction of the Court Street & East End Railroad, the Legislature passed a general act (ch. 252) relating to surface railroads in all villages and cities in this State. The Court Street & East End Railroad Company was incorporated and took its franchise under that act, with the consent of the common council of said city. That act provides that the railroad company shall pave, or pay the expenses of paving, between its tracks and two feet each side thereof.

Both of the defendants now join in the contention that the defendant company is exempt from the burden of any additional expense for paving said street.

This question has been passed upon twice by the Appellate Division of this department, unfavorably to these defendants' contention; although by a divided court. On the last appeal two of the learned justices of the Appellate Division dissented, holding that, by the peculiar wording of the charter and franchise, the defendant company constructed and is now running and operating said road, under its original charter.

If I felt at liberty to differ from the prevailing opinion, I am inclined not to do so, since it seems to me that the distinctions drawn by the dissenting opinion are obviously too technical to be absolutely just to the plaintiff and the other taxpayers upon and along said street. I cannot see the force of the distinction sought to be made between the words "consolidated with" and "consolidated into" the defendant company, as applied to the almost undisputed facts in this case. I do not see, as a matter of construction, how the phrase "consolidated with" does not mean essentially "consolidated into," since it cannot be possible that it was the intention of either of these companies, so consolidated, to be consolidated with, except that the companies were to be merged into, each other. Merger means something more than mere consolidation. See Merger, 2 Bouv. L. Dict. 175; Webster's Inter. Dict. 914. Can it be possible that the term "consolidated with" means that the company did not enter into the merger and that each franchise still stands separate, simply because the word "with" was used instead of the word "into?"

What distinctive thing or power is left of the Court Street and East End Company, so consolidated with the defendant com-

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pany? What right is reserved to the Court Street & East End Company? What right has it in this road now being operated? Are not the charter and franchise of that company incorporated into the defendant company?

It may be true that the phrase "incorporated into" is a better phrase than "consolidated with," but in the construction of statutes words are sometimes to be given a special signification, for the purpose of carrying out the intention of the parties, as well as the obvious intention of the legislators. In the interpretation of statutes and the acts of parties, contracts are to be given an interpretation which will best carry into operation and effectuate the objects to be attained, without reference to accurate grammatical construction of a word, phrase or sentence. In other words, grammar must yield to the fact, for the purpose of carrying out the intention and object sought to be attained, instead of defeating both the intention of the legislators and the object of the parties. Jackson v. Topping, 1 Wend. 389; Watervliet Turnpike Co. v. McKean, 6 Hill, 616; Auburn City Bank v. Leonard, 40 Barb. 119; Mullins v. People, 24 N. Y. 399; Matter of Tobin, 53 App. Div. 453; Folmsbee v. City of Amsterdam, 142 N. Y. 118; Spencer v. Myers, 150 id. 269; Kinkele v. Wilson, 151 id. 269. Since the learned justices, dissenting, practically admit that if the phrase "consolidated into" had been used, it would then be easy to agree with the majority of the court in the construction given by them.

With this proposition disposed of, it would be easier to proceed with the case and grapple with the other questions raised, since these difficulties would then be only imaginary.

Are the defendants' claims that the road is now being run and operated under the defendant company's original charter and franchise substantial? It is a rule of construction that the interpretation which the parties themselves have given and placed upon a contract may be used for the purpose of that interpretation. I think it is a mistake to say that the original charter and franchise were enacted and granted without conditions, since the defendant company was not bound to build its road upon East Court street; it had the option only to do so. It was left to the defendant company to exercise that option, *first,* within five years; *second,* within two subsequent extensions of time. It is not necessary to say that the franchise was abandoned, absolutely, after the

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expiration of the time limit; but it does seem sensible to hold that its option was at an end and that the defendant company so construed and regarded it: *First,* because it sought no further extension of the option. *Second,* because the time which elapsed between the expiration of the time for using the option, and the full operation of the franchise, nearly twenty-two years, ought to be sufficient to warn it that it had lost that option, if not the franchise to that portion of Court street.

Again, the defendant company standing by, without objection or protest to the granting of the franchise to the Court Street & East End Company, is another acknowledgment that it had lost its option, and therefore its right to construct and operate said road on this portion of said street. This continued from 1887 down to 1894, seven years; as the evidence shows, without a protest or any declaration on its part that it had any rights in the operation or construction of a road on that portion of said street. Moreover, when it negotiated with, when it took and merged into its corporation, the Court Street and East End road, it again acknowledged the supremacy of that road and continued to operate it under that purchased franchise, until the reconstruction of that portion of the road. It is not necessary for me to say that any act of the Legislature had been overlooked or forgotten, but it is enough that the defendant company recognized the rights, charter and franchise of the Court Street & East End Company from 1887 down to 1898 at least. How can it now reasonably or sensibly claim that it bought out, consolidated with, or into the other company, and is now continuing the operation of the road under its own original charter? If no harm were to come to anybody by the defendants' present contention and construction of the statute, there would be no occasion to differ with the defendants' contention. Other rights have intervened. A new statute, more favorable to the taxpayers and therefore to the city, has been enacted during the period of the omission or neglect of the defendant company to exercise its option to construct and operate a railroad upon and over the *locus in quo.*

It goes without saying that the charter and franchise are an additional burden, upon the street, to the abutting owners and to taxpayers, and it was to relieve the city and its taxpayers of a portion of this burden that the new law was enacted, extending the pavement between, and two feet each side of the track, giving

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to the abutting owners and the city and its inhabitants better facilities for going along and upon said street; and when the business of said thoroughfare demanded the increased expense of paving, that the defendant company should share to the full extent of the statute in the expense of its construction. This seems to me to be the intention of the Legislature in granting a charter at all that the street should be restored to its original usefulness and should be kept in repair for the use of the public.

The defendant company now contends, and is joined by the city in that contention, that it has acquired its right to exemption from its original charter, with the consent of the city, the other defendant. This is attempted to be done, ignoring the rights of the abutting owners, the taxpayers, and the city at large, for the benefit of the defendant company. This certainly is not equitable, nor in my judgment is it lawful or proper that the additional burden, beyond one-fifth of the expense for paving said street, should be thrown upon the city, abutting owners, and the taxpayers at large. Archer v. City of Mt. Vernon, 63 App. Div. 286. Even if the city had the technical right to do so, it ought not to be permitted to exercise it under the circumstances; but I think that the law itself forbids and prohibits such a contract between the city and the railroad company.

The consent of the inhabitants along the street to construct said road cannot be construed as a waiver of their rights or a bar to their now insisting that their rights shall be protected. As an original proposition it ought to be condemned; no right is given to said city, by its charter, nor is there any statute which gives it the power, to make such a magnificent gift to the company against the protest of the taxpayers and the abutting owners upon said street.

In the case of Conway v. City of Rochester, 157 N. Y. 33, 38, the learned chief justice of the Court of Appeals uses expressive language prohibiting such a gift by a municipal corporation in favor of a railroad company. "The municipal authorities are given no power to relieve a railroad corporation of the whole or any portion of the needed repairs, or to impose the whole or any portion of the cost upon the abutting owners or the city at large."

The learned Appellate Division adopts that reasoning in its disposition of the case at bar. Kent v. Common Council, 61 App. Div. 323; s. c., 72 id. 623. This doctrine, in effect, was affirmed

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by the Court of Appeals in Ingersoll v. Nassau El. R. R. Co., 157 N. Y. 453, and is followed and approved in Village of Mechanicville v. Stillwater & M. S. R. R. Co., 35 Misc. Rep. 513.

This is an action in equity and the rules of equity should be applied as the situation is disclosed at the end of the trial. Lyle v. Little, 28 App. Div. 181; Sherman v. Foster, 158 N. Y. 587.

As I have already said, it is not necessary to hold that the defendant company has abandoned its charter, but it has lost its right to exercise its option, and it ought now to be estopped from reclaiming it.

It is said in People v. Broadway R. R. Co., 126 N. Y. 29, that "This defendant should not stand in the streets of Brooklyn claiming franchises which for many years it refused to use, and thus bar out other railroads which might be constructed for public convenience and accommodation. If these franchises are of no value it is not harmed by the judgment of the Special Term. If they are valuable and of growing worth it should have discharged its duty to the public by using them."

In People v. Albany & Vermont R. R. Co., 24 N. Y. 261, the Court of Appeals said: "It seems that the corporation owes a duty to the public to exercise the franchise granted to it, and that it cannot abandon a portion of its road and incur a forfeiture at its mere pleasure."

So far as the abandonment of its franchise is concerned, I am aware of the fact that it will not be held to have abandoned its charter and franchise over that portion of the road which it did accept and which it has continued to operate, without some affirmative action either by the State or the municipality interested to declare it abandoned. Trelford v. Coney Island R. Co., 6 App. Div. 204; Matter of Brooklyn E. R. R. Co., 125 N. Y. 434; People v. Ulster & D. R. R. Co., 128 id. 240.

Both defendants have recognized the fact of the abandonment of its option to construct and operate this piece of road, by the consolidation, the building of the new tracks upon the defendant company's petition and the consent of the municipality properly recorded, since it would be foolish to contend that, if it still had the right to exercise that option, the defendant company would again ask the municipality in these latter years to consent to the building and operation of its present road.

I think the plaintiff's contention is strengthened rather than

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weakened, both by the answer and the additional evidence given on this trial.

If I am correct in the conclusions reached, the plaintiff is entitled to the relief demanded in his complaint, and to a permanent injunction restraining the municipality from enforcing the tax levied.

Judgment is granted accordingly, with costs.

Judgment accordingly, with costs.

JOHN M. NICHOLS, Plaintiff, *v.* FREDERICK T. NICHOLS and ADALINE A. HICKOX, Defendants.

(Supreme Court, Chenango Trial Term, February, 1903.)

Action to set aside a fraudulent transfer — Rights of bona fide transferee.

An action, by the assignee of a judgment against a firm, to set aside a transfer of a farm made by the partner, served, to his sister and to make the judgment a lien on fire insurance moneys which she received upon the loss of buildings on the farm, cannot be maintained where it appears that the other partner of the firm has paid the judgment, where the plaintiff has made no attempt to enforce payment from the firm assets, where he participated to some extent in the negotiations which led up to the alleged fraudulent transfer, and where the sister paid some consideration for it and also assumed certain obligations against the farm.

If she took the transfer in good faith, to help her brother, she would, upon a retransfer, be entitled to be repaid her advances and whatever else she had obligated herself to pay.

If she had [redacted]urable interest in the property and the insurance was taken out for her benefit, it would belong to her.

ACTION to set aside a transfer of real estate.

H. C. & V. D. Stratton, for plaintiff.

Burr W. Mosher (Harvey D. Hinman and W. B. Matterson of counsel), for defendants.

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FORBES, J. This is an action brought to set aside a transfer of real estate from Frederick T. Nichols to Adaline A. Hickox, and to make the judgment a lien upon certain fire insurance moneys collected by the defendant, Hickox — received by her as losses from the burning of certain buildings located upon the farm transferred to her by her brother, the other defendant.

The plaintiff is the son of Frederick T. Nichols. Frederick T. Nichols and Thomas B. Foote were copartners, engaged in business at Binghamton, N. Y. They borrowed from the Binghamton Trust Company, upon their note, signed "Nichols & Foote," and "T. B. Foote," the sum of $1,000, which went into their copartnership business and which became a copartnership debt. After the note fell due and became payable, a joint action was commenced against Frederick T. Nichols and said Foote. The complaint alleged the copartnership and the making and delivery of said note to the Trust Company. For some reason, service was not made upon Thomas B. Foote, although there is no evidence to show that he did not then reside at Binghamton, N. Y., within the jurisdiction of the court.

I think a reasonable inference may be drawn that the action was commenced by the Trust Company, in form against said copartners, at the request or instance, and for the benefit of said Foote, since shortly after the judgment was perfected Foote paid said judgment without taking an assignment thereof. It is claimed by the plaintiff that said Trust Company was thereafter to sign any paper which should subsequently be demanded by said Foote. This matter ran along until August 23, 1900, when, without the knowledge of said Foote, and at the suggestion and by the request of Roger P. Clark, an assignment was made by the Trust Company to said Foote. Subsequently, with Foote's knowledge, an assignment was made to this plaintiff. The consideration paid was $45. The judgment, entered September 21, 1894, was for $1,036.54. Inferentially, the assignment was made to the plaintiff for the purpose of enabling him to enforce the payment of that judgment.

Proceedings supplementary to execution were instituted and an examination was made of the defendant Hickox for the purpose of disclosing the transaction between the defendant, Frederick T. Nichols, and said Hickox. Thereafter this action was commenced. If this action can be maintained at all, it must be maintained

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upon clear and conclusive evidence that a fraudulent transfer took place between the defendants, Frederick T. Nichols and said Hickox. Taylor v. Taylor, 35 N. Y. St. Repr. 622; s. c., affd., 129 N. Y. 623; Erwin v. Curtis, 43 Hun, 292; Farmers & M. Bank v. Smith, 70 N. Y. Supp. 536; La Tourette v. La Tourette, 54 App. Div. 137; s. c., affd., 167 N. Y. 613; Murray v. Sweasy, 69 App. Div. 45.

Second, the action being based upon the recovery of a lawful, existing judgment against the grantor of said premises, the issuing and return of an execution unsatisfied and the inability on the part of the judgment creditor or his assignee to enforce the collection of said claim in any other manner, it is insisted, by the defendant Hickox, that, while the debt upon which said judgment is predicated was in form a copartnership debt against the firm, still the other copartner, Thomas B. Foote, was the one primarily liable to pay and satisfy the same. From the evidence in this case and the circumstance of the long delay in securing the transfer to, or enforcement of, said claim by the plaintiff, that position seems to be quite tenable.

At all events, upon its face, this was a copartnership debt; and the obligation was paid by said Foote, either voluntarily or by an arrangement with said Trust Company. If it was so paid, the obligation as a judgment against the defendant, Frederick T. Nichols, at the time of this payment, was extinguished and then became inoperative as the basis of this action. Harbeck v. Vanderbilt, 20 N. Y. 395; Booth v. F. & M. Nat. Bank, 74 id. 228; Zimmerman v. Gaumer, 152 Ind. 561; s. c., 53 N. E. 829.

There is no evidence that any attempt has been made to adjust the copartnership transactions or to enforce this judgment against the copartnership assets. The judgment itself, in form, became a judgment which might have been enforced against any copartnership assets in the hands of either partner.

Again, the evidence shows that the plaintiff was present during the negotiations, or a portion of those negotiations, when the transfer of the real estate from Nichols to Hickox took place. That he was also present at some time and understood that the debt, upon which said judgment was based, through some arrangement or obligation as between the copartners was to be adjusted and satisfied by said Foote. That some consideration was paid for the transfer by the defendant, Hickox, and that certain obliga-

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tions against the premises were assumed and agreed to be paid by her, is clearly shown by the evidence.

There is evidence sufficient, undoubtedly, to show that the transfer may have been questionable; but, as between the parties who knew of and voluntarily participated in the transaction, if fraudulent, the court would ordinarily leave them where it finds them, since they cannot come into court, except with clean hands, and ask the court to interpose and adjust their rights. Poppe v. Poppe, 114 Mich. 649; s. c., 72 N. W. 612.

While certain letters introduced in evidence may be construed as harmful to the defendant, Hickox' contention, she insists that she intended to commit no fraud. The proof is that the letters were written and her signature signed by her husband. Aspell v. Campbell, 64 App. Div. 393.

Since the law requires that she must knowingly have participated in the fraudulent transfer, there is enough in the case from which to draw the inference that she took the transfer in good faith, to assist her brother, the other defendant. If this is so, whatever she became obligated to pay and whatever she advanced must be refunded to her before she can be asked to retransfer the property to any one. Lary v. Pettit, 66 N. Y. Supp. 834; Grosjean v. Galloway, 64 App. Div. 547.

The insurance was probably made for her own benefit and became a contract between her and the insurance company. If this is so then the insurance money became her own and she would not be compelled to turn it over to any one else, if she had an insurable interest in the property. Addis v. Addis, 38 N. Y. St. Rep. 468; Hand v. Williamsburgh City Fire Ins. Assn., 57 N. Y. 41; Harvey v. Cherry, 76 id. 436; Hathaway v. Orient Ins. Co., 134 id. 409.

I think therefore that the plaintiff's complaint must be dismissed with costs.

Judgment may be entered accordingly.

Judgment accordingly.

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CLARENCE O'DELL, Plaintiff, *v.* ALANSON HATFIELD, Defendant.

(Supreme Court, Cortland Special Term, February, 1903.)

Malicious prosecution — Probable cause.

Where there is no dispute about the facts of an action for malicious prosecution the question of probable cause for the arrest is one of law for the court.

Where the plaintiff, although an overseer of highways, unnecessarily, without authority or notice, and against the defendant's protest, tears down his fence bounding a highway, the defendant has a right to assume that the act was malicious and unlawful.

His failure to prosecute the plaintiff, after causing his arrest, does not show malice or want of probable cause for the arrest at the time when it was made.

ACTION for malicious prosecution. Motion for a new trial.

William D. Tuttle, for plaintiff.

Dougherty & Miller, for defendant.

FORBES, J. The action is for malicious prosecution. The plaintiff was arrested upon an information, under a criminal warrant, for tearing down and destroying a fence enclosing the defendant's premises along a public highway. The questions to be examined are: *First,* Are the information and the warrant upon which the arrest was made sufficient in form? *Second,* Was there reasonable and probable cause for the institution of the criminal proceeding? I think the warrant and information are sufficient. People v. Upton, 29 N. Y. St. Repr. 777, and cases there cited; s. c., 55 Hun, 612; People ex rel. Allen v. Hagan, 170 N. Y. 46.

Both the informant and the prosecutor were sworn and examined before the magistrate. Code Crim Pro., § 148. The information charges a criminal offense. Code Crim. Pro., § 149; Penal Code, § 654.

At the close of the plaintiff's evidence, the complaint was dismissed. This is a motion for a new trial upon the minutes, under section 999 of the Code of Civil Procedure.

Plaintiff established the following facts: The defendant in-

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stituted the criminal proceeding and caused the plaintiff's arrest. The proceeding was terminated by the discharge of the plaintiff without trial, the prosecutor not appearing. Upon the trial, the court held, as matter of law, that the plaintiff had not established want of reasonable and probable cause for the arrest. There was no dispute about the facts, and the question of probable cause is a question of law for the court. Brown v. McBride, 24 Misc. Rep. 235; following, Wright v. Bank of Metropolis, 110 N. Y. 249; Palmer v. Palmer, 8 App. Div. 331; Anderson v. How, 116 N. Y. 336; Hazard v. Flurry, 120 id. 223; Shipman v. Learn, 92 Hun, 558; Evins v. Metropolitan St. R. Co., 47 App. Div. 511.

There is evidence sufficient to show that there had been some ill feeling between the parties and that it probably existed at the time of the arrest. It is asserted on the part of the plaintiff that the defendant had been requested, some time in the spring of 1901, and again in the fall of 1901, to take down and remove his road fence, at the point in question. This he refused to do. The fence was located upon a stone wall about eighteen inches high. The posts of the fence were built or driven into the stone wall and thus held in place. The plaintiff, in the months of November and December, 1901, tore down and removed said fence from its place, without giving proper notice to and against the wishes of the defendant. There is no evidence to show that the plaintiff was in any manner authorized to remove the same, nor is there any evidence of an immediate necessity for such removal. On the trial, the plaintiff claimed that he was an overseer of the highway and that the fence was removed at the suggestion of the commissioner of highways to prevent the way from becoming drifted at that place. At the time of the removal there had been a fall of snow. There was no drifting at that time; the roads were perfectly passable. The fence had stood in the same position for many years. The evidence shows that the highway had at times drifted badly at this point. The highway and the land on each side are comparatively level. There was no reason why the plaintiff should assume that the road thereafter might become impassable, and even had that been anticipated, the public, as a matter of necessity, would have had the right to pass out of the road upon the defendant's land and thus avoid going through the drifts. Holmes v. Seely, 19 Wend. 507; Williams v. Safford, 7 Barb. 309; White v. Wiley, 36 N. Y. St. Repr. 102.

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It had been the custom to shovel through the drifts at this point and it looks as though the plaintiff was attempting to exercise an authority and power which did not exist in him. Highway Law (Laws of 1890, chap. 568), § 21. The defendant therefore, under the circumstances, had the right to assume that when the fence was taken down without his knowledge or consent, and against his protest, that it was done maliciously and that it was an unlawful act. Wrench v. Samenfeld, 47 N. Y. St. Repr. 378; Anderson v. How, 116 N. Y. 336; People v. Kane, 131 id. 111; Highway Law (Laws of 1890, chap. 568), §§ 21, 72, 105. That it was done innocently and in good faith is no defense to an unlawful interference with the defendant's rights. In other words, there was apparently no necessity for the removal of said fence, since at that time there was no obstruction of the highway.

Under the circumstances the legal test is, what would a prudent and reasonable man have inferred from the depredation committed upon his premises? Fagnan v. Knox, 66 N. Y. 525; Willard v. Holmes, Booth & Haydens, 142 id. 492.

In the case last cited it is held, "The question is, not what the actual facts were, but what the defendant had reasonable cause to believe they were when instituting the former action, and if, as he so believed, they furnished reasonable cause, the failure of the action is no evidence of want of probable cause or of malice." I think the defendant was warranted in drawing the conclusion that the act was willful and malicious, and therefore an unlawful violation of his rights. People v. Kane, 131 N. Y. 111.

In an action for malicious prosecution, the burden is on the plaintiff to show want of probable cause, where he knows the facts on which defendant acted. Kutner v. Fargo, 34 App. Div. 317. In an action of this character, "there are four things which must be shown affirmatively — the institution of the proceeding; the want of probable cause; malice, and the termination of the prosecution in favor of the plaintiff; and the burden of proof is upon the plaintiff to show each of these facts." Shafer v. Loucks, 58 Barb. 426; Hamilton v. Davey, 28 App. Div. 457. Hence it is necessary for the plaintiff to prove that the defendant had no reasonable and probable cause to make the complaint against him, and that he did it maliciously and with intent to injure the plaintiff. Osborn v. Stephens, 74 Hun, 91.

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It is asserted that the plaintiff in the removal of the fence in question was acting as overseer of the highway, under the direction of the commissioner of highways. This does not make the act lawful, since a public officer has no right to use his authority as a cloak for the commission of a crime. If the fence was an encroachment upon the road or an obstruction to the public highway, the defendant should have been given notice to remove it, and failing to do so the overseer might then himself lawfully act. Highway Law, *supra*. Hathaway v. Jenks, 67 Hun, 289; Kline v. Hibbard, 80 id. 50; s. c., affd., 155 N. Y. 679.

An overseer or commissioner of highways may lawfully remove obstructions of or encroachments upon a public highway, when a necessity for such removal arises in the administration of his duties; but he should not seize an occasion to do an unlawful act to the injury of the defendant, nor without waiting to see whether the act done was necessary to protect the traveling public. In this case the stone wall along the defendant's premises was at least eighteen inches above the highway; this may have been the cause of the prior drifting.

In my judgment, the plaintiff, in the performance of his duty towards the defendant, should have waited until there was a real obstruction to the highway at that point, instead of anticipating that there might be such obstruction. For instance, if the winter were a mild one, with very little snow,— as the fact was during the winter of 1901 and 1902,— then there could be no necessity for taking down or destroying the defendant's fence.

It is conceded that no drifts were present down to the time of the commencement of the criminal proceeding, which was instituted about the sixth day of February. The plaintiff knew those facts at the time the arrest was made, and it looks as though he was intentionally using his official authority to annoy the defendant and destroy his property.

It is true the evidence shows that the plaintiff sought to justify himself in removing the fence, and his explanation on the trial of his conduct towards the defendant is of no importance in determining the fact of probable cause. If he thought it was necessary to remove the fence at that time, or having removed it, without notice and against the defendant's protest, good judgment and good conscience, would have dictated that he should have seen his neighbor to inform him of the facts, and there is little doubt

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that if he had done so the criminal proceeding would not have been instituted against him.

I think the motion for a new trial should be denied with costs.

Motion denied, with costs.

Matter of the General Assignment of CHARLES B. BOSTWICK to SAMUEL MARSH, for the Benefit of Creditors.

(Supreme Court, New York Special Term, February, 1903.)

Assignee for benefit of creditors — Commissions and costs of his accounting.

Although an assignee for benefit of creditors has neglected during six years to invest the fund yet, where, upon his accounting, he has not been charged with interest, he will not be denied commissions or the taxable costs of his accounting.

MOTION to confirm the report of a referee.

Charles W. Coleman, for motion.

Richards & Brown (J. Treadwell Richards, of counsel), opposed.

BLANCHARD, J. This is an application to confirm the report of a referee to whom was referred the question of the allowance of the commissions of an assignee for the benefit of creditors and the allowance of taxable costs of the accounting proceeding. The referee has reported adversely to the allowance of both of these items. Previous to the reference of these questions the account had been referred to the same referee and his report thereon made and confirmed. Upon the second reference the assignee was not allowed commissions because of the failure of the assignee to invest the funds in his hands and because his neglect so to do for six years "resulted in a distinct loss to the assigned estate." The only asset of the assigned estate realized upon by the assignee was a claim of $1,750, collected through his attorney, whose claim for services was allowed at $900, al-

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though considerably more was claimed. The learned referee says that "in stating the account of the assignee he was not charged with interest on funds in his hands, as he might properly and justly have been." The fact remains, however, he was not so charged, and his accounts have been stated and have been confirmed by the court. It does not seem fair to deprive the assignee of his commissions, because something might have been charged against him which was not so charged. Although counsel have not called my attention to any authorities on the matter of the allowance or disallowance of commissions, I find that the court is justified in depriving an assignee of his commissions in certain extreme cases. Matter of Coffin, 10 Daly, 27; Matter of Danzig, 16 N. Y. St. Repr. 708; affd., 110 N. Y. 682; Matter of Wolf & Kahn, 1 N. Y. St. Repr. 273. It would seem, however, that in these cases the conduct of the assignee was such as either to cause his removal or to justify it. In the present case I do not think the failure to invest the sum which the referee found properly chargeable against the assignee would have been a sufficient ground for his removal by the court, nor do I think it sufficent cause for the disallowance of his commissions. In the matter of the allowance of taxable costs I am likewise obliged to differ with the learned referee. He says: "The case of Ginsberg, 9 Misc. Rep. 650, seems to be a sufficient authority for denying his claim for costs or counsel fees in this proceeding." The case is sufficient authority for denying counsel fees, but not costs. It is stated at the foot of page 650 of the report of that case that the court allowed taxable costs to the attorneys. The commissions will be allowed to the assignee as provided by statute and the taxable costs to the attorneys for the assignee. As thus modified, the motion to confirm the referee's report is granted.

Ordered accordingly.

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THE PEOPLE ex rel. FRANK ACRITELLI and PETER F. ACRITELLI, Doing Business Under the Firm Name of F. ACRITELLI & SON, Relator, *v.* WARREN W. FOSTER, as Justice of the Court of General Sessions, Respondent.

(Supreme Court, New York Special Term, February, 1903.)

Crimes — Allowance to counsel assigned in a capital case — Code Crim. Pro., § 308 — Mandamus to enforce a legal right.

The right of the trial court to compensate counsel, assigned in a case where the indictment charges an offense punishable by death, is not confined by Code Crim. Pro. § 308, to such defendants as appear for arraignment without counsel, and the trial court may lawfully compensate counsel who appeared at the arraignment and were assigned afterwards but before the commencement of the trial.

Where a judge of the General Sessions of the Peace, in which the case was tried, has refused to act upon the application for compensation solely upon the ground of a lack of power, the Supreme Court will, by a peremptory mandamus, compel him to act thereon and this because mandamus is the proper remedy where some legal right has been refused or violated and there is no other appropriate legal remedy.

APPLICATION for a writ of peremptory mandamus.

C. B. F. Barra (Lewis Stuyvesant Chanler, of counsel), for relator.

George L. Rives, Corporation Counsel (Theodore Connoly and George Landon, of counsel), for respondent.

FITZGERALD, J. Relator as assignee of counsel who was assigned under the provisions of section 308, Code of Criminal Procedure, to defend one DiMedicis (who had prior to assignment of said counsel been indicted for murder in the first degree), applies for a writ of peremptory mandamus directed against Hon. Warren W. Foster, judge of the Court of General Sessions, requiring him to determine and allow reasonable compensation for the services as such counsel of his assignor. Judge Foster

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presided at the trial of the accused, who was acquitted by the jury. Application was subsequently made to him as trial judge for compensation for services rendered by counsel under the assignment, but was refused (39 Misc. Rep. 438). No order was entered upon this decision, nor would it have been appealable if entered. People v. Heiselbetz, 26 Misc. Rep. 100; 51 N. Y. Supp. 685. The learned judge, however, in an opinion handed down, a copy of which is attached to the papers submitted in opposition to this motion, takes the position that he is without discretion in the matter, and that as he interprets the law (section 308, Code of Criminal Procedure) unless the defendant appears without counsel when arraigned the court is without power to allow compensation. A brief resumé of the facts will illustrate this point. It appears that defendant in the capital case appeared before respondent sitting as a judge of the Court of General Sessions, Part I, June 27, 1902, for arraignment upon an indictment found against him on June twelfth preceding by the grand jury of the county, that upon said arraignment defendant appeared with counsel and pleaded "not guilty"; that thereafter and on the eighth day of July following an application was made to a justice other than the respondent sitting in the same part, and that the order attached to the moving papers was then and there obtained. Respondent takes the position that as a matter of law under these circumstances there is no power under the statute to award compensation. I do not agree with this view of the law. The statute in question is of a remedial nature, and should receive reasonable construction. "Is not the real question what the people meant, and not how meaningless their words can be made by the application of arbitrary rules?" Cooley Const. Lim. (6th ed.), chap. 14, p. 75. To what extremes would this circumscribed interpretation lead us? If counsel assigned upon the arraignment should die or become from any cause unable to appear upon the trial, are the beneficent purposes of the Legislature to be defeated? If the accused for good cause became dissatisfied with counsel assigned in the first instance, should the court be deaf to his complaint, or, if satisfied that it was well founded, be powerless to extend relief? At common law the object of the arraignment was to obtain the plea, but if the plea was voluntarily made without it and accepted by the court, nothing more was required (1 Bishop Crim. Pro. [3d ed.], § 733), and it has been the invariable practice of criminal

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courts to assign counsel to a defendant at any time before the commencement of a trial. Can it be contended that the power to so assign is exhausted unless made at the arraignment in accordance with the strict language of section 308? To hold so would be to deny a power in courts which has never before been questioned, and which has been exercised under the written and unwritten law of the State since a remote period of its history. In strong contrast with such limitation is the language of the Court of Appeals in People v. Ferraro, 162 N. Y. 545. "We have repeatedly held that said section (308), when construed in the light of the several progressive changes made by the legislature, means that the limitation imposed by the words 'not exceeding the sum of $500' applies to the trial court and to the appellate court separately, and not collectively." Some suggestion is made that section 308 of the Code of Criminal Procedure (Laws of 1897, chap. 427) is unconstitutional; that it is violative of article VIII, section 10; but the court at Special Term, in view of the many adjudications had under it, does not feel called upon to pass upon this question, being mindful, moreover, of the fact that there are decisions in other States which have held similar provisions valid. There is some suggestion of impropriety in regard to the manner in which the order assigning counsel was obtained, but I am not called upon to express any opinion upon that matter; it well may be a subject proper to be considered by the trial judge upon the question of what compensation should in fairness be allowed; but the refusal herein is placed squarely upon what it is claimed is a want of power, and the only question involved in this proceeding is the single one as to whether or not upon the conceded facts the discretion to compensate, and to what extent might have been lawfully exercised by respondent. This court cannot of course interfere with the discretion of the Court of General Sessions, and if that discretion had been exercised a mandamus would not lie, but it is the proper remedy where "some legal right has been refused or violated, and there is no other appropriate legal remedy." People ex rel. Oebricks v. Superior Court of City of N. Y., 5 Wend. 115. The writ, then, will be allowed to the extent that respondent be directed to act upon the application.

Ordered accordingly.

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THEODORE BAUMEISTER, Plaintiff, *v.* FRANK DEMUTH, Defendant.

(Supreme Court, New York Special Term, February, 1903.)

Specific performance — Defects in the appointment of a guardian ad litem in foreclosure.

In an action by a vendor for the specific performance of a contract for the sale of land which he had bought in, three years previously, upon a foreclosure of a mortgage which he had held upon the land, it appeared that on the day for closing the purchaser, defendant, had rejected the title upon the grounds that the foreclosure was defective in that the mother of an infant defendant, who she stated was aged fourteen, had petitioned for the appointment of a guardian *ad litem* for him instead of the infant's doing so himself, that although the venue of the guardian's affidavit was Westchester county it was verified before a New York city commissioner of deeds, that the guardian did not state therein that he had no interest adverse to the infant, and that the affidavit was verified before the petitioner's attorney. Eight days after the day for closing the vendor attempted to cure these defects by an *ex parte* order, amending *nunc pro tunc* the proceedings for the appointment of the guardian *ad litem*, changing the venue of his affidavit to the county of New York, making the petition of the mother recite that when she petitioned the infant was under fourteen, showing that the guardian had had no interest adverse to the infant and confirming the guardian's acts. Two days later the vendor again tendered the deed and it was rejected.

Held, that the purchaser was justified in rejecting it.

THIS action was brought for specific performance of a contract for the purchase of real property in the borough of Manhattan and city of New York, made by the plaintiff as vendor with the defendant as vendee. Plaintiff derives his title from the foreclosure by himself of a mortgage he held covering the property. On July 1, 1902, the date set for closing the contract, the parties attended at the place named in the contract for closing title, and the defendant tendered the purchase price and the plaintiff tendered a deed which the defendant refused to accept for the five reasons stated in the opinion. No adjournment

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was taken of the contract. On July 9, 1902, plaintiff, unknown to the defendant or his counsel, but on notice to the attorneys for the parties who had appeared in the foreclosure action through which he had so derived his title to the premises, and on some of the parties themselves therein, procured an order of this court amending *nunc pro tunc* the proceedings for the appointment of the guardian *ad litem*, by changing the venue in the affidavit to the county of New York, and amending the petition by making the same recite, as of the date of the former provision, that the infant was under the age of fourteen years, with the same force and effect as if it had originally so recited, and directing that the affidavits annexed to the notice of motion be filed and attached, together with the order itself, with the judgment-roll, with the same force and effect as if they had been attached at the time of the appointment, and confirming the appointment of the guardian *ad litem*, and directing that "the act and proceedings of said guardian *ad litem* be and the same hereby are ratified and confirmed in all respects." Thereafter, and on July 11, 1902, plaintiff went to the defendant's place of business and tendered him a deed. Defendant replied that such matters would have to be referred to his attorney. Plaintiff walked downstairs, swore to the complaint before a notary public who was a clerk in his office, and the notary went immediately back and served the summons and complaint upon the defendant.

Theodore Baumeister and Samson Lachman, for plaintiff.

Edward P. Orrell and Edward W. S. Johnston, for defendant.

MacLean, J. Title was to be passed between the parties at the plaintiff's office July 1, 1902, at noon. There and then they met. The defendant tendered the balance of the consideration — execution of a purchase money mortgage to be drawn by the plaintiff and $2,400 in money. The plaintiff tendered a deed to which it was objected that in the foreclosure, through which came his title (1) the appointment of a guardian *ad litem* had been upon the petition of the mother who deposed that her child was of the age of fourteen years and the court might not appoint a guardian upon such petition; (2) that the venue of the affidavit of the guardian was laid in Westchester county while it purported

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to have been verified before a commissioner of deeds for the city of New York; (3) that it was not stated in his affidavit that the guardian had no interest adverse to the infant; and (4) that the petitions for the appointment of the guardian *ad litem* for both infant defendants were verified before a notary public who was the executor of the deceased parent of the infants and also the attorney of one of the petitioners. Another objection, that certain liens of judgments had not been cut off, will not be considered here. As was his right, the defendant refused to take the deed which was all the plaintiff tendered or had to tender. There was no adjournment, postponement or extension of the time for performance. Both stood upon their rights. When they parted each could consider his relation to the other as pronounced and determined. Under date of the same day the plaintiff wrote the lawyer, who had advised the defendant as to the title and its defects, asking whether he would accept the title with the deed of the executor of the deceased holder of the fee. He replied he thought the defects would be obviated only by strict foreclosure which would not take long, and that if desired he would advise his client, the defendant, to await that, adding that he would be pleased to confer with the plaintiff and aid him. This civil offer of co-operation should have been availed of. No response was given it. On July eleventh two persons repaired to the front of the defendant's place of business in upper Broadway. One, a clerk, went in, tendered the defendant the papers again, and demanded that he pay the money, execute the mortgage and receive the deed, to which the defendant replied that such matters would have to be referred to his attorney. The clerk walked downstairs to the plaintiff in waiting, swore him to his complaint, already prepared, and turning about served a copy of it with a summons. So the action was on and rudely. It is for specific performance of the purchase. In answer the defendant sets up the facts named as defects and counterclaims for his expenses about examining the title. In the days between the noon-hour set for passing the title and the beginning of this action, the plaintiff at Special Term obtained without intimation to the defendant but upon affidavits and notices to some of the parties and notice, after their power to bind had lapsed, to the attorneys of other parties in the foreclosure action, which he had conducted himself, an order amending *nunc pro tunc* as of

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November 30, 1898, the proceeding for the appointment of a guardian *ad litem* by changing the venue of the affidavit to the county of New York, amending the petition by making the same recite as of November 30, 1898, that the infant was under the age of fourteen years, with the same force and effect as if it had originally so recited, and directing that the affidavits annexed to the notice of motion, viz., of the petitioning mother respecting the age of the infant child, of the guardian *ad litem* asserting at length his qualifications for guardianship, including his lack of interest adversely to the infant, and of the present plaintiff characterizing the omissions and inconveniencing statements as clerical errors, be filed and attached, together with the order itself, with the judgment-roll, with the same force and effect as if they had been attached at the time of the appointment. Besides all that, the appointment of the guardian *ad litem* was also confirmed, and it was further ordered that "the act and proceedings of said guardian *ad litem* be and the same hereby are ratified and confirmed in all respects." Even were this order efficacious and competent for all the plaintiff would have it, to sustain his contention would seem too much like making an agreement for the parties or rather to constrain the defendant to accept a situation tardily created and harshly presented, and impose upon him and his successors a title inviting cavil, only to be obviated by concessions of benefit, usually reductions of price. After what had happened, the demand that the defendant perform in a trice was not merely unreasonable; it was unwarranted altogether. By their course and conduct the parties had made the very time they had theretofore set an essentially fixed fact. As they separated without offer, promise or request, with no suggestion of meeting again, without intimation that the plaintiff could or would try to cure the defects and resting on their several rights as they stood, the intending purchaser could not complain if the seller sold to another nor could the seller complain if the buyer used his money elsewhere or not at all. The objections made were serious. The affidavit of the would-be guardian *ad litem,* shown upon its face to have been taken outside of the jurisdiction of the certifying commissioner, was a nullity (61 N. Y. 63); the statement as of fact, the action taken by the court thereon contrary to the law; the absence of the required statement in the affidavit, such as it was, of the person offering himself as guardian;

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these, taken together, colored, too, by the verification of the petition before the petitioner's attorney, are more than criticisable, and enable the minor upon coming of age, when rise in value may increase the temptation, to seek to avoid the decree, by an existing but not now exercisable right of which the court may not improvidently deprive him. Infants being adjudged in law incompetent to manage their own affairs or conduct their own litigation with suitable prudence and discretion, the statutes and rules of practice, having the force of statutes, providing for appearance in their behalf are deemed to have a substantial object in view and are to be observed accordingly. Nonobservance of them may be waived by infants upon coming of age if they so elect, but they may not be compelled to abide the result if they elect not to be bound. Either and all of these faults were correctible before the entry of the judgment. They were not, according to learned authority, to be disregarded under any statute of jeofail, nor may they be overlooked under the Code of Civil Procedure according to any case referred to in the briefs. To cure them by an order *nunc pro tunc*, especially after the lapse of more than three years from the entry of the judgment, even with an appendix of ratification and confirmation by judicial legislation resembling a remedial statute, goes beyond any specimen or precedent cited to the court. The plaintiff might have relieved himself and his title from their predicament by more ways than one had he sought such relief rightly instead of resorting to a misleading byway. The order entered is beyond the purview of a *nunc pro tunc* entry whose office is to supply omission in the record of action really had, but omitted through inadvertence or mistake. Its procurement was an imposition upon the court to which the paper should not have been submitted for judicial sanction upon the assumption, in the part devoted to litigated motions that papers presented by reputable counsel upon seemingly due notice without opposition offered have common approval and are proper to be entered by the court. This order thus procured has not so medicined as to cure the infirmities of the proceedings, which to be valid and bind the infant must set forth the facts conferring jurisdiction with proof of conformity to the statute. The petition and affidavits needful thereto are the individual acts of the petitioners and affiants which the court may not mend, any more than it may change an undertaking. As

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yet no proper petition has been made part of or even filed with the judgment-roll. To characterize as flimsy the objections which he has been so troubled to meet helps the plaintiff's claim little. Nor is his apprehension to be shared that if his opponent's "contentions are to be sustained there is scarcely a title in the city which cannot be assailed successfully and conveyancing would come to a standstill." Better things are known and expected from the skill and diligence of the learned lawyers busied with the transfer of real property and whose deserved reputation gives the presumption of reliability of titles even under the cumbersome system of recording still obtaining, which reputation and presumption will be strengthened and not lessened by sustaining the rejection of titles barnacled with blunders of procedure. Judgment for the defendant, with costs.

Judgment for defendant, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* JACOB V. BOOTMAN and HOWARD R. ROBINSON, Defendants.

(Supreme Court, New York Special Term, February, 1903.)

Forest, Fish and Game Law — Complaint for a penalty need not refer to the statute nor need the summons refer to it, by indorsement, where the complaint is served with it — Negativing exceptions to the statute — Penalty additional to punishment for the misdemeanor — Presumption from possession of birds in the forbidden season — Construction of amendatory act, L. 1901, ch. 91, §§ 30, 33.

It is unnecessary in an action to enforce a penalty under the Forest, Fish and Game Law to recite or refer to the statute in the complaint.

It is sufficient to allege facts bringing the case within the purview of the statute.

Where the complaint is served with the summons it is not necessary to indorse a reference to the statute upon the summons.

The Forest, Fish and Game Law, as amended by chapter 91 of the Laws of 1901, contains no exception which requires that, in an action to enforce a penalty under section 39 thereof, the complaint allege that the case is not within any saving clause of said act.

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The expression "and is liable to a penalty", in section 39 of the act, means that in addition to the criminal liability the offender subjects himself to a civil action for a recovery of the penalty prescribed.

The presumption of a violation of the statute, arising from the possession of the birds specified therein in the forbidden season, is as true as a rule of pleading as it is as a rule of evidence.

Sections 30 and 33 of the amendatory act cannot be reconciled. Section 33 is applicable to birds for which there is no open season, and in order to create an offense thereunder it must appear not only that birds in the possession of the alleged offender are wild birds but also that they are birds for which there is no open season, while section 30 relates only to birds for which there is an open season except from May first to August thirty-first, both inclusive.

THE complaint in this action consisted of nineteen counts, the first of which is as follows: "For a first, separate and distinct cause of action, that the defendants were, during all the times hereinafter, and still are, copartners in trade and engaged in business in the City and County of New York, State of New York, under the firm name and style of Bootman & Robinson; that heretofore, to wit, on the 23rd day of May, 1901, at the said City and County of New York, the defendants, copartners as aforesaid, unlawfully, wilfully and knowingly possessed four hundred and ninety-six (496) grouse and two hundred and thirty-six (236) quail during the close season for said grouse and quail respectively, contrary to the form of the statute in such case made and provided. That by reason of the premises, the defendants then and there became liable to a penalty of Sixty dollars and to an additional penalty of Twenty-five dollars for each bird, grouse and quail so possessed, to wit, the sum of Eighteen thousand three hundred dollars, and amounting in all to the sum of Eighteen thousand three hundred and sixty dollars. That thereafter, to wit, on the 6th day of July, 1901, at the State aforesaid, the Chief Game Protector of the State of New York, duly ordered that this action be brought, and the same was and is brought on said order by the undersigned attorneys and counsellors at law, then duly retained and employed therefor."

Counts II–XIII, both inclusive, were of the same general character.

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The fourteenth count is as follows: "For a fourteenth separate and distinct cause of action, that the defendants were, during all the times hereinafter mentioned, and still are, copartners in trade and engaged in business in the City and County of New York under the firm name and style of Bootman & Robinson; that heretofore, to wit, on the 24th day of May, 1901, at the said City and County of New York, the defendants, copartners as aforesaid, unlawfully, wilfully and knowingly possessed certain wild birds, other than the English sparrow, crow, hawk, crane, raven, crow blackbird, common blackbird, kingfisher, and birds for which there is no open season, to wit, eight hundred and eight (808) plover, and contrary to the form of the statute in such case made and provided and without and not under the authority of any certificate issued under this act, to wit, An Act of the Legislature of the State of New York, entitled an Act for the protection of the Forest, Fish and Game of the State of New York, constituting Chapter 31 of the General Laws, passed February 19th, 1900, as amended by Chapter 91 of the Laws of 1901, passed March 12th, 1901. That by reason of the premises the defendants then and there became liable to a penalty of Sixty dollars and to an additional penalty of Twenty-five dollars for each bird, so possessed, to wit, the sum of Twenty thousand two hundred dollars and amounting in all to the sum of Twenty thousand two hundred and sixty dollars. That thereafter, to wit, on the 6th day of July, 1901, at the State aforesaid, the Chief Game Protector of the State of New York, duly ordered that this action be brought and the same was and is brought on said order by the undersigned attorneys and counsellors at law, then duly retained and employed therefor."

The fifteenth count, which is in substantially the same form, seeks to recover penalties for the possession of 876 English snipe, 602 plover, 1,416 snow buntings and 96 snipe.

The sixteenth count seeks to recover penalties for the possession of 288 reed birds, 3,630 plover and 1,512 snow buntings.

The seventeenth count seeks to recover penalties for the possession of 1,336 snipe and 3,168 sand-pipers.

The eighteenth count seeks to recover penalties for the possession of 720 reed birds, 5,760 snow buntings, 1,439 sand-pipers, 488 yellow legs, 150 plover.

The nineteenth count seeks to recover penalties for the pos-

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session of 3,658 plover, 3,000 sand-pipers, 4,800 snipe and 300 yellow legs.

The defendants demurred to the amended complaint and to each of the causes of action therein set forth on the ground that it did not state facts sufficient to constitute a cause of action.

Section 30 of the Forest, Fish and Game Law, as in force when the plaintiff's alleged causes of action accrued, read as follows: "The close season for Wilsons (called English snipe), yellow legs, plover, rail, mudhen, gallinule, surf-bird, curlew, water-chicken, jack snipe, bay snipe, or shore bird shall be from May first to August thirty-first, both inclusive."

The act contained no provision declaring that there shall be no open season for sand-pipers, snow buntings and reed birds.

Section 33 read as follows: "Wild birds, other than the English sparrow, crow, hawk, crane, raven, crow blackbird, common blackbird, kingfisher, and birds for which there is no open season, shall not be taken or possessed at any time, dead or alive, except under the authority of a certificate issued under this act."

Section 39 provided: "A person who violates any provision of this article is guilty of a misdemeanor and is liable to a penalty of Sixty dollars, and an additional penalty of Twenty-five dollars for each bird taken or possessed in violation thereof."

Frank S. Black and Henderson Peck, for plaintiff.

Louis Marshall and Julius Offenbach, for defendants.

O'Gorman, J. The statute under which this action is instituted extends over the entire State and is in no sense a local law. It was, therefore, unnecessary to recite or refer to the act in the complaint. The pleader was required only to allege facts bringing the case within the purview of the act, and this has been done. Section 1897 of the Code is inapplicable. The complaint accompanied the summons, and in such a case no reference to the statute need be indorsed upon the summons. The statute in question contains no exception within the section of the act, and the complaint, therefore, does not offend against the rule requiring the pleading to show that the case is not within an exception to the statute. The expression, "and is liable to a penalty," etc., in section 39 of the act, clearly means that in addition to the criminal liability the offender subjects himself

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to a civil action for the recovery of the penalty prescribed. There is no such ambiguity in the language as to support the defendants' contention. The possession of the birds at the forbidden season within the State is *prima facie* evidence that the possessor has violated the law, and the burden is then cast upon him of proving facts to show that the possession is legal (People v. Buffalo Fish Co., 164 N. Y. 99), and this is as true as a rule of pleading as it is concededly true as a rule of evidence. As to the birds mentioned in counts XIV to XIX of the complaint, the claim of the defendants must be upheld. Sections 30 and 33 cannot be reconciled. Under section 30 plover and snipe have a closed season from May first to August thirty-first, and section 33 is applicable to birds for which there is no open season. In order to create an offense under section 33 it must appear not only that the birds are wild birds, but also that they are birds for which there is no open season. Therefore, if they are birds having an open season, or if there be no express provision that there shall be no open season, the taking or possession of them constitutes no offense. Courts will go far to preserve the paramount intention of the Legislature where it is possible to do so, but here the incongruities are so serious and irreconcilable that the construction urged by the plaintiff's counsel can be yielded to only by the court usurping legislative functions. No cause of action is set forth in these counts, and as to them the demurrer is sustained. In all other respects the demurrer is overruled.

Ordered accordingly.

NOTE.—An appeal was taken from the interlocutory judgment entered on this decision to the Appellate Division of the First Department and resulted in an affirmance, no opinion being delivered. 72 App. Div. 619. Thereafter the following questions were certified to the Court of Appeals:

1. Do counts I to XIII, both inclusive, of the amended complaint state facts sufficient to constitute a cause of action?

2. Is the plaintiff entitled to maintain a civil action for the recovery of penalties under section 39 of the Forest, Fish and Game Law, constituting chapter 31 of the General Laws of the State of New York, for a violation of any of the provisions of article II of said act?

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3. Is the amended complaint defective because it is not therein alleged that the various birds for the possession of which the defendants are sought to be charged with penalties were taken or killed within the boundaries of the State of New York?

4. Are facts sufficient to constitute a cause of action stated in counts numbered from XIV to XIX, both inclusive, of the amended complaint, or in either of said counts?

5. Can the defendants be made liable in this action under section 33 of the Forest, Fish and Game Law, as amended by chapter 91 of the Laws of 1901, and section 39, of said Act, by reason of the possession by them as alleged in counts XIV to XIX, both inclusive, of the amended complaint, of the birds described in said several counts?

On February 10, 1903, the Court of Appeals rendered the following decision (173 N. Y. 622): "Judgment affirmed without costs to either party, on opinion below; the first and second questions certified answered in the affirmative, and the third, fourth and fifth in the negative.

Matter of the Application of GERTRUDE M. STEWART, a Judgment Creditor, etc.

(Supreme Court, New York Special Term, February, 1903.)

Supplementary proceedings — Debtor having no existence in law — Construction of foreign statutes — Revocation of an attorney's authority.

The Illinois statute of 1893, relative to an assessment life or accident insurance company, authorizing dissolution for insolvency and making no provision that the corporation might after dissolution be continued long enough to wind up its affairs, superseded the Illinois statute of 1874 providing that an insurance company might for such a purpose be continued for two years after dissolution.

Therefore, where a creditor of an Illinois assessment life insurance company, reincorporated under said act of 1893, recovers and enters judgment against it in the State of New York after it has been dissolved in Illinois but within two years of the dissolution, she cannot take supplementary proceedings upon the judgment and examine here a third party as to property of the corporation alleged to be in

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the third party's hands and this because the corporation had no existence, in contemplation of law, when the judgment was recovered.

The fact that an attorney, retained by the corporation before its dissolution, appeared for it upon the trial of the action, which the said creditor brought against it here, is not material as its dissolution revoked his authority to appear for it or bind it.

MOTION for the reargument of a motion heretofore granted vacating an order for the examination in proceedings supplemental to execution, of the Mutual Reserve Life Insurance Company.

Pavey & Moore, for petitioner.

George R. Burnham, Jr., for Mutual Reserve Life Insurance Company.

SCOTT, J. This is a motion for the reargument of a motion heretofore granted vacating an order for the examination, in proceedings supplemental to execution, of the Mutual Reserve Life Insurance Company, alleged to be the debtor of the Northwestern Life Assurance Company, against which the petitioner claimed to have recovered a judgment in this court. The order for the examination of the third party was vacated upon the ground that the Northwestern Life Assurance Company, an Illinois corporation, had been dissolved by a decree of the Superior Court of Cook County, Illinois, prior to the pretended recovery of the judgment against it by the petitioner, and that the corporation had thereby ceased to exist, so that no valid judgment could be rendered against it. Hence it was considered that the alleged judgment, which formed the basis of the order for the examination of the third party was utterly null and void for every purpose, and consequently that no valid order in proceedings supplementary to execution could be founded upon it. 39 Misc. Rep. 275, 79 N. Y. Supp. 525. The petitioner now moves for a reconsideration of the motion to vacate the third party order upon the ground that although, by a decree of the Superior Court of Cook County, Illinois, the Northwestern Life Assurance Company was decreed to be dissolved in January, 1901, yet by virtue of a statute of the State of Illinois, not called to the attention of the court on the former motion, the said company

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was, nevertheless, continued as a body corporate for a term of two years after its dissolution for the purpose of prosecuting and defending suits. The petitioner's alleged judgment against the Northwestern Company was entered within two years after the entry of the decree of dissolution in the Illinois court. Hence it is argued that the company had not then become defunct so far as concerns its liability to a judgment, and the judgment obtained against it was a valid judgment and a sufficient basis for proceedings supplementary to execution. If the statute above cited applied to the Northwestern Company the argument would be unanswerable. The Northwestern Life Assurance Company was an Illinois corporation, and the effect of a judgment of dissolution entered in a court of that State is to be determined by the laws of the State. The question then is whether or not the statute upon which the petitioner relies applied to the Northwestern Company. The statute, now apparently a part of the Revised Statutes of Illinois, was adopted in 1874, and is entitled "An Act in relation to the dissolution of insurance companies." The first section of the act provides that if the auditor of State (now the insurance superintendent) shall be of opinion that any insurance company is insolvent, or in a condition to render a continuation of its business hazardous to the insured or the public, or that it has failed to comply with the law, he may apply to a Circuit Court for an injunction to restrain the company from proceeding further with its business. The remainder of the section prescribes the power and duties of the court as to enjoining the further transaction of business, but makes no provision for the appointment of a receiver. The second section provides for a voluntary dissolution of such a corporation, and a decree pronouncing such dissolution, but there is no reference in this section to the appointment of a receiver. The third section declares when charters shall be deemed to be extinct by reason of non-user, and provides for fixing the time within which such companies shall close their concerns. The fourth section upon which the petitioner relies provides as follows: "Insurance companies whose charters expire by their own limitation, or become forfeited by non-user, or are dissolved by decree of Court or otherwise, shall, nevertheless, be continued bodies corporate for the term of two years, after such expiration, forfeiture or dissolution, for the purpose of prosecuting and defending suits by

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or against them, and of enabling them gradually to settle their concerns, to dispose of and convey their property, and divide their capital stock and assets, but not for the purpose of continuing the business for which they were organized." The fifth section provides that when the charter of an insurance company expires, is forfeited or annulled, or the corporation is restrained from further prosecution of its business, or is dissolved, the court may, at any time before the expiration of said two years, appoint a receiver or receivers. The remainder of the act is taken up in prescribing the power and duties of such receivers. It is to be noted that this is a general act, applicable by its terms to all insurance companies, and that its theory appears to be that dissolved insurance companies are usually to be permitted to wind up their own affairs, the appointment of a receiver not being a necessary adjunct of such a dissolution, but a remedy to be applied after dissolution if found desirable. The Northwestern Life Assurance Company was what is known as an assessment company. In 1893 the Illinois Legislature passed an act applying especially to such companies entitled "An Act to incorporate companies to do business of life or accident insurance on the assessment plan, and to control such companies of this State and of other States doing business in this State, and to repeal a certain Act therein named, and providing and fixing the punishment for violation of the provisions thereof." The Northwestern Company was reincorporated under this act, pursuant to the provisions thereof. The act is extremely specific and comprehensive and has been declared by the Supreme Court of Illinois to constitute a complete code "for insurance corporations of the character of the Northwestern Company." Lehman v. Clark, 174 Ill. 279. By the seventh section of the act it is provided that the companies to which it is applicable "shall be subject only to the provisions of this Act." By the eighteenth and nineteenth sections of the act provision is made for the dissolution of such companies. Whenever the insurance superintendent becomes satisfied that such a company is insolvent, or has exceeded its powers, or acted contrary to law or fraudulently he may lay the facts before the Attorney-General, who may apply for an order to show cause why the company should not be dissolved and restrained from continuing to transact business. The com-

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pany is entitled to be heard, and to a trial by jury, if any fact alleged in the insurance superintendent's report is traversed. If the company be found to be insolvent the court may render judgment "that it and each officer thereof be perpetually restrained from exercising any corporate rights, privileges or franchise, and that it be dissolved and a receiver be appointed," etc. In my opinion the provision relating to the dissolution of insurance corporations generally as contained in the act of 1874, and the provisions relative to the dissolution of assessment companies as contained in the act of 1893 are so inconsistent that they cannot stand together, and consequently that so far as regards assessment companies the provisions of the earlier act must be deemed to have been superseded and repealed by the later act. As already pointed out the act of 1874 contemplated, even in the case of an insolvent corporation, that its affairs might be wound up and its assets distributed by the corporation itself without the interposition of a receiver. In view of such a possibility it was reasonable, and perhaps even necessary that so far as was required to wind up the business and collect and distribute the assets the corporate existence should be continued. In the case of an assessment company however there is no provision which would permit the corporation itself to wind up its affairs. If the court finds the fact of insolvency and makes a decree it must be that the company be dissolved and a receiver be appointed, the appointment of the receiver being a necessary accompaniment to the decree of dissolution. Where the receiver is appointed at once and the corporation and all its officers restrained from exercising any corporate rights, privileges or franchise, as is the case when an assessment company becomes insolvent, there is no reason or occasion for extending the corporate existence of the corporation, and consequently there is to be found no provision for such extension in the act of 1893. My conclusion is that the dissolution of the Northwestern Life Assurance Company was regulated and governed by the act of 1893, and that the fourth section of the act of 1874 was inapplicable thereto, and that, since the act of 1893 contained no provision continuing the corporate existence of an assessment company after dissolution, the Northwestern Company became defunct upon the entry of the decree of dissolution. The fact that an attorney who had been retained by the Northwestern Company before

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the dissolution undertook to appear for it on the trial of the petitioner's action in this court is of no consequence and does not make her judgment valid. The dissolution of the corporation clearly revoked the attorney's authority to appear for or bind it. Matter of Norwood, 32 Hun, 196.

The motion must be denied, with ten dollars costs.

Motion denied, with ten dollars costs.

MARTIN A. SHAW, Plaintiff, *v.* BEATRICE ENGLISH, Impleaded, etc., Defendant.

(Supreme Court, Otsego Special Term, February, 1903.)

Remainder — When vested.

The will of William Shaw, proved in 1884, devised to his son William G. the use of a certain farm known as the Turner farm, excepting two lots of which one was the hay barn lot, until his death and thereupon devised the fee equally to his children living at the time of his decease. In another clause the testator directed the hay barn lot to be used in connection with his homestead farm for ten years after his decease and further directed that it thereafter revert and be used and pass like the Turner farm. William G. had one daughter Bertha, who died before his death in 1901 but after the testator, and she left a child now surviving.

Held, that the devise to William G. did not lapse by his death without children of his body and become divisible among all the testator's children, but that Bertha took a vested remainder which upon her death passed to her child.

That the ten years' devise of the hay barn lot postponed enjoyment but did not suspend title or the power of alienation.

ACTION for partition.

Arnold & Cooke, for plaintiff.

James J. Byard, Jr., guardian, in person.

A. R. Gibbs, for defendant English.

Alva Seybolt, for other defendants.

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FORBES, J. This is an action for partition. In the year 1884 William Shaw died seized, in fee simple, of real property known as the Turner Farm, with other real estate.

Shaw's will was admitted to probate in Otsego county on the 6th day of May, 1884. The testator left him surviving a widow who is now dead. He left, among others, a son, William G. Shaw.

By the first clause of his will a devise was made as follows: "I give, devise and bequeath to William G. Shaw, my son, the use of the farm bought by me of Samuel E. Turner, except the hay barn lot, used as a meadow and enclosed by a fence, and except also the saw mill lot and log-way and right of way to it as now used, to be used and enjoyed by him during his natural life and until his death; and I give and devise to his children living at the time of his decease the same in fee to be shared equally between them."

Certain devises of real estate were made to other children of the deceased.

The fourth clause of said will reads as follows: "The hay barn lot above described is to be used in connection with the homestead farm for ten years after my decease, after that time it is to revert back and to be considered a part of the farm devised to the heirs of William Gorton Shaw and pass under the first clause of this will, the use to William G. Shaw and the fee to his children as above described in that clause."

William G. Shaw went into possession of the premises and enjoyed the use thereof until the 29th day of August, 1901, when he died leaving him surviving the defendant, Beatrice English, his granddaughter. William G. Shaw had one daughter, Bertha R. English, who died after the death of the testator, but before the death of her father, William G. Shaw. The question here to be determined arises under the first and fourth clauses of the will.

Did the estate, so devised to William G. for life, vest in Bertha R. English, or did the bequest to her lapse, on her death, before the death of her father?

This action is to partition that portion of said estate which was devised to the daughter, Bertha R. English, the mother of the defendant Beatrice English.

The rule of construction undoubtedly is that the intention of

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the testator, if it can be found in the will, must be carried into effect. The testator having devised his property specifically and having allotted to each of the several devisees his portion of the property, did the testator intend that if his son, William G. Shaw, died without children, of his own body, that the estate so devised to him for life should then lapse and pass to all of the testator's children as though he had died intestate as to that portion of his real property?

The policy of the law undoubtedly is to uphold vested legacies; the presumption being that the testator intended to pass all of his estate, not dying intestate as to a portion of the devises sought to be made.

The canon of interpretation to the effect that if there are two modes of interpreting a will, that one is preferred which will prevent total or partial intestacy, where that application can be made and such inference from the will can so be drawn; still it has no application as against controlling statutes and decisions. Matter of Kimberly, 150 N. Y. 90.

The law favors the vesting of estates, even though the period of possession is postponed. Crose v. Chapman, 153 N. Y. 466.

A will providing that all of a testator's real and personal property, after the payment of his debts, shall go to his widow during her life, "then to such of my children as may be alive share and share alike," gives her a life estate, with remainder to the children, postponing the enjoyment but not the vesting of the remainders until the termination of the life estate. Connelly v. O'Brien, 166 N. Y. 406. So the court holds: "The law not only favors the vesting of estates but such a construction of a will as will avoid the disinheritance of children who happen to die before the time of distribution." Matter of Russell, 168 N. Y. 175; following Connelly v. O'Brien, *supra;* see also Heath v. Hewitt, 127 N. Y. 166.

"One for whose benefit during life a trust is created by will, with the provision that on his death without lawful issue the estate shall go to the testator's heirs as if the will had not been made and the beneficiary had died before the testator, will not be excluded from taking, as heir of testator's daughter, a share of her interest in the remainder which the will vested in her, subject to being divested if the beneficiary died leaving issue." Wadsworth v. Murray, 161 N. Y. 274; Prowitt v. Rodman, 37 id. 42; Matter of Logan, 131 id. 456.

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Where the interpretation warrants the conclusion that the testator intended that a particular heir should be benefited by the devise, even upon the contingency of arriving at the age of twenty-one years, it has been held that the share of the mother vested in the child on the mother's death, and became due and payable at once. Arnot v. Arnot, 75 App. Div. 230; 78 N. Y. Supp. 20.

Whenever it is clear from the whole will that the provision made for the child was to terminate at his death a vested legacy or devise does not take place, and if the child died before the life-tenant the devise passes to the other heirs to be distributed by law. Clarke v. Cammann, 160 N. Y. 315.

Where the remainder is clearly contingent and liable to be defeated by the happening of an event, or the power of alienation is suspended, in that case the devise does not vest. Carmichael v. Carmichael, 1 Abb. Ct. App. Dec. 309; Patchen v. Patchen, 121 N. Y. 432; Matter of Allen, 151 id. 243; McGillis v. McGillis, 154 id. 532; Dougherty v. Thompson, 167 id. 472.

The use of the property by one devisee for a definite time does not suspend the power of alienation so as to defeat the devise, since it must be regarded as held in trust or for the benefit of the remaindermen. Van Brunt v. Van Brunt, 111 N. Y. 178; Wilber v. Wilber, 165 id. 451.

The two clauses of this will, relating to the devise in question, must be read together. When so read they fairly show that the intention of the testator was that the property bequeathed and devised should go to the heirs of his son, William G. Shaw; since it must be conceded that where the limitation is to the person living at the time of the first devisee's death and to her heirs and assigns forever, this carries the estate to the grandchild if one is left. Smith v. Lawrence, 66 Hun, 362; Matter of Paton, 111 N. Y. 481; Matter of Logan, 131 id. 460.

Apparently, by the scheme of the devise in question, it was intended by the testator that the heirs of his son, William G. Shaw, should take a vested estate in that portion of the real estate which would have come to his daughter, under the will, had she outlived the life-tenant. The devise of the other portion of the estate, the use of which, for a definite term of ten years, was to be enjoyed with the home farm, was not a suspension of title or the power of alienation, but only a postponement of its enjoyment by the devisee.

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By this will another devise was made for the benefit of the testator's son, Orson Shaw, during his life; this devise was then to go to his children and heirs, except the saw-mill property which Orson took in fee. The will then provides for the conversion into personal property of the testator's land at Page's Corners, to accumulate the sum of $5,000, and provides for the payment to Martin Shaw, another son, of $1,000, but if the personal property was found to be less than $5,000, with the land directed to be sold, that legacy was to be reduced to $500.

The use of the balance of that portion of the estate, after the death of the testator's wife, was to be divided between his son Orson and Mary Allen, his daughter. That portion bequeathed to Mary Allen, at her death, was to go to the heirs of her body.

The will seems to have been drawn upon the general scheme of the use and support for life for the children of the testator, and at their death the property of which each took a life estate was to be transmitted, by said will, to the children of each.

This interpretation seems to be warranted from the fact that no other disposition by the testator was made of this particular devise to any other of the heirs; and this was probably understood to have been an equitable provision for each of the testator's children and for the child or children of each devisee.

The defendant Beatrice English was living at the time of the testator's death. The provisions of this will, as drawn, are not very lucid, and the words "living at the time of his death," may have been intended to read as his, the testator's death. In that event, upon his death, the devise would have vested in the child Bertha R. English, and upon her death this portion of said estate would have passed to the defendant Beatrice English.

I think the complaint in partition should be dismissed, with costs to the defendant Beatrice English, and judgment may be entered accordingly.

Judgment accordingly.

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CATHERINE E. PLATT, Plaintiff, *v.* THE VILLAGE OF ONEONTA, Defendant.

(Supreme Court, Otsego Trial Term, February, 1903.)

Municipal corporation — Its right to reclaim and remove a sidewalk for which the abutting owner would not pay.

Where an assessment, proper in amount, for a flagged sidewalk in a village is resisted by the grantee of an abutting lot, is void because made as against the "estate" of her grantor, and is never corrected, relevied or collected in any way, the village, when charged by its charter, through its trustees, with the care and custody of village property and empowered to lay sidewalks and levy an assessment for the cost, may reclaim and remove the sidewalk. The village does not lose dominion or control of its materials by placing them on the street in question.

ACTION for damages.

J. Lee Tucker (Albert C. Tennant, of counsel), for plaintiff.

D. W. Miller, for defendant.

FORBES, J. This action is for damages claimed to have been sustained by the plaintiff in the taking up and removal of a stone sidewalk, under the direction of and laid by the defendant on the southerly side of Chestnut street, in said village, under a resolution passed by the trustees of said village, June 20, 1898. At the time this sidewalk was laid, Andrew H. Platt was the owner and in possession of said premises. He subsequently died without having paid his proportionate share of the cost for laying said walk. After his death his executors, on February 16, 1899, conveyed to the plaintiff the premises in question. The deed contained the following clause: "The same is conveyed subject to any claim the village of Oneonta may have against said land for sidewalk taxes or assessments."

After the death of said Andrew H. Platt the trustees of the defendant sought to levy and enforce against said premises two-thirds of the cost for the construction of said walk by taxation. The assessment, however, was made and entered upon the tax-roll against the "Platt Estate." The actual amount assessed

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by the defendant as owing by said Platt was the sum of $115.67, as is shown by the assessment-roll.

A controversy arose over the legality of the assessment, levy and enforcement of said tax. The objection was raised that the assessment was void, upon the ground that the defendant did not acquire jurisdiction over the property assessed, nor of the person against whom said tax was sought to be levied.

After the plaintiff went into possession of said property she refused to pay said tax, nor did she, in any manner, recognize the validity of the same. Notice was duly given to plaintiff that unless the tax so levied was paid, the defendant would remove said walk. This walk was clearly within the line of the street and ran along and upon the plaintiff's premises on Chestnut street 263½ feet. Upon the refusal of the plaintiff to pay said tax the defendant, through its officers, and by a resolution duly passed and entered upon the records of said village, ordered the removal of the walk from plaintiff's premises, in October, 1900; laying it upon another street in said village. These facts are undisputed and raise a novel question. At the close of the trial each side asked for the direction of a verdict in its favor. The jury was discharged and the case was finally submitted to the court.

The original assessment and the tax were undoubtedly void. Matter of Chadwick, 59 App. Div. 334; Matter of Adams v. Supervisors, 154 N. Y. 619; Matter of McCue v. Supervisors, 162 id. 235; followed in Matter of Gardner v. Supervisors, 167 id. 621; People ex rel. McHarg v. Gaus, 169 id. 19.

The plaintiff's counsel sought to avoid the question of the illegality of the assessment and tax, but the question was raised by the pleadings; and the submission was made by the defendant upon that theory.

Under the defendant's charter, it is given full control of all streets and sidewalks in said village, together with the exclusive control and management of all the finances and property of said village. The defendant's charter of 1892, page 11, section 26, reads as follows: "The board of trustees shall have the exclusive control and management of all the finances and property of the village and of the roads, streets, avenues, alleys and public places of the village." By subdivision 2, section 26 (p. 12), said village was "to provide for the care and custody of all property, records, books and papers of the corporation."

It is admitted by the pleadings that Chestnut street is one of

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the public streets of said village. It is undisputed that the materials used in the construction of said walk belonged to the defendant, at the time this sidewalk was constructed.

Section 33 (p. 22) of the charter provides: "The expenses of grading all streets, not graded by the adjoining property-owners, or otherwise, shall be borne by the corporation. The expenses of any sidewalk, guttering and curbing shall be borne one-third by the corporation and two-thirds by the property-owners adjacent thereto, on the side of the street where the same is laid."

Section 34 (p. 22) provides: "The trustees shall decide when and where all public improvements shall be made and all work on streets, side and crosswalks, paving, sewers, drains, and all public works shall be done by and under the direction of the board of trustees, and when once completed shall each and all be kept in repair by the corporation at the public expense."

Section 36 (p. 23) provides for the assessment of the expense for the construction of sidewalks; for the meeting of the board of trustees to hear grievances and objections to the assessments, and each party so assessed is given the privilege of paying the same within thirty days, without percentage for collection.

The evidence shows that after the sidewalk was completed, notice of the assessment was duly given to the owner. The owner appeared by counsel and objected to the assessment, upon the ground that the assessment and the tax proposed to be levied were irregular and void.

The evidence shows that these taxes remain unpaid, that the assessment-roll was never corrected and that no attempt was thereafter made to enforce the collection by or through the tax so levied, and that the assessment was not relevied, nor carried into any subsequent tax-roll, as the law requires. See 59 App. Div. 334, and authorities *supra*.

The plaintiff on taking her title to said premises did not assume the payment of said tax, nor did she in any manner recognize its validity, nor was she in any manner bound by the assessment or tax. If I am correct in this construction, then there was no way left in which the defendant could enforce said tax against her or her property.

I think the whole scheme of uniting in the construction and completion of sidewalks, in said village, was so far in the nature

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of a contract with the village that the property-owners were to assent to and to contribute two-thirds of the cost of said construction.

Had the assessment and tax levied been acquiesced in, instead of repudiated by the owner, the defendant might be in a position to recover against the property-owner.

The power and authority given to the defendant to construct and complete said sidewalk gave to it an implied authority to remove the same and reclaim its property, in case the owner repudiated the benefit which would accrue to him upon the completion of said walk. Attorney-General v. Boston, 142 Mass. 200.

Having the exclusive right to enter upon the street for the purpose of laying the walk and completing the same, I do not think the defendant lost control of or dominion over its property by placing the same upon the street.

The trustees, under the charter, were bound to preserve the property of the village and would have no right to give it away or to release it to an adjoining owner, without compensation. It is a principle of the common law that an individual or a corporation may reclaim and take its property in whosesoever hands it may be found, if it can be done without a breach of the peace. The defendant had the right to build or to refuse to build a walk.

The defendant's charter must be given a fair and favorable construction for every beneficial purpose. Charter, p. 37, § 78, subd. 3.

I do not think it can be successfully contended that the plaintiff can repudiate her liability to contribute to the completion of said walk and at the same time retain the benefits of such construction, in defiance of the rights of the village and its other taxpayers. Justice at least requires that the title to the property should remain in the defendant. It is conceded that the cost of the walk at the time of its completion was $175.

I have been unable to find, nor has my attention been called to, any adjudicated case in this State in which this question has been raised.

The complaint must, therefore, be dismissed, and judgment is directed for the defendant, with costs.

Complaint dismissed and judgment directed for defendant, with costs.

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WILLIAM POTTER, Plaintiff, *v.* FRANK C. SHEFFER, as President of Local Union No. 62, of the Brotherhood of Painters, Decorators, and Paperhangers of America, Defendant.

(Supreme Court, Rensselaer Special Term, February, 1903.)

Injunction — Reinstatement in a labor union.

Upon a motion to vacate an *ex parte* temporary injunction enjoining a labor union from treating the plaintiff (whom it had expelled for being, contrary to its rules, a member of the National Guard and with whom it refused to work) as not a member of the union and from refusing to grant him full membership and a full membership card, it appeared that the plaintiff had entered the union as an apprentice, that he never had received any card other than an apprentice card, that he never had been paid the wages of a journeyman, and that the notice of expulsion did not mention his status in the union. It further appeared that the union denied that he had ever been a full member or had had such a card.

Held, that, under the rule that one seeking relief by injunction must show himself clearly entitled thereto, the injunction must be vacated.

MOTION to vacate a temporary injunction.

Yates & Grupe (Judson S. Landon, of counsel), for plaintiff.

Calvin E. Keach, for defendant.

HOWARD, J. This action was brought against the defendant as president of Local Union No. 62 of the Brotherhood of Painters, Decorators and Paperhangers of America, to recover damages resulting from the loss of employment of the plaintiff because of his discharge from the employ of Sheffer & Barry, contracting or boss painters in the city of Schenectady, which discharge was occasioned by the service upon said Sheffer & Barry, by the Brotherhood of Painters, Decorators and Paperhangers of America, on the 7th day of November, 1902, of the following notice:

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"LOCAL UNION No. 62,

"BROTHERHOOD OF PAINTERS AND DECORATORS OF AMERICA,
"[Seal impressed.]

"SCHENECTADY, N. Y.,
Nov. 7th, 1902.

"SHEFFER AND BARRY:

"GENTLEMEN.— This is to certify that Mr. William Potter was expelled from Local Union No. 62. Cause, being a member of the National Guard contrary to our rules as laid down in our National By Laws. And the members of Local Union No. 62 refuse to work with Mr. William Potter.

"FRANK C. SHEFFER, *Prest.*
"DOUGLAS H. PRATT,
"Recording Secretary."

He also asks for a judgment of the court "forthwith admitting him to the enjoyment of membership in said Local Union No. 62, with all the rights, privileges and benefits thereof, as if no debarment or expulsion had been attempted, and that a membership card or certificate be forthwith given him to such effect, and fully declaring the same," and "that the said act of attempted expulsion be declared null and void," and "that said local union be enjoined and restrained from treating him in any way, particular or respect as not a member of said local union, and be enjoined from refusing to accord and grant to him any and every right, privilege and benefit of said membership of said Local Union No. 62 in good standing and from refusing to grant him a card of membership." And "that pending the action a preliminary order of injunction to the above effect be granted."

The plaintiff's attorney appeared before the court *ex parte* on the 4th day of December, 1902, and procured an injunction order restraining the said Local Union No. 62, and each and all the officers, members, delegates, etc., "from treating the plaintiff in any way, particular or respect as not a member of said Local Union No. 62, and be and hereby are each and all enjoined from refusing to accord and grant him any and every right, privilege and benefit to full membership to said Local Union No. 62 in good standing, and from refusing to grant him a card of membership therein." This is a motion on the part of the defendant to vacate the temporary injunction.

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The plaintiff is twenty-three years of age and resides in the city of Schenectady, is an able-bodied male citizen of the United States and of the State of New York. In the fall of 1900, according to his own affidavit, he joined Local Union No. 62 of the Brotherhood of Painters, Decorators and Paperhangers of America, "as a painter's apprentice," at that time being an apprentice and uniting with the organization under its rules for the admission of apprentices. "At about the time of the entry of this plaintiff into said local union and his becoming a member thereof he received the usual membership working card which was never surrendered by this plaintiff, and which was lost in some manner which deponent cannot now remember, and he has been unable, after careful and diligent search, to find the same. And deponent never asked for and never received any membership working card since that date. About May 12th, 1900, he enlisted as a private in Company F of the Second Regiment of the National Guard of the State of New York and has ever since been and still is such private." His wages while employed by Sheffer & Barry were for some time prior to November 11, 1902, and at that time, two dollars per day. On November 7, 1902, said Local Union No. 62, by resolution, declared that the plaintiff should be and thereby was expelled from said union. The plaintiff alleges that the unincorporated association known as the Brotherhood of Painters and Decorators of America was, on December 7, 1894, merged in the corporation known as the Brotherhood of Painters, Decorators and Paperhangers of America, and that the constitution of the first-named association was adopted by the latter and so remained until its revision in December, 1901, and that a copy of this constitution before revision was delivered to the plaintiff about the time he became a member of said union, as a copy of the constitution and by-laws both of said local union and of the national brotherhood. There was, however, an earlier revision, dated December 4, 1899. In the first-mentioned constitution section 1 of article 7 reads as follows: "Any person to be admitted to full membership in this brotherhood must be a painter, decorator or paperhanger engaged at the trade and competent to command average wages, not more than fifty years of age, except as hereinafter provided, and of good moral character and of sound health, and not afflicted with any disease or subject to any complaint likely to endanger life."

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In the revision of December 4, 1899, section 1 of article 7, and in the revision of December, 1901, section 1 of article 8, the so-called "militia clause" is found added, which reads as follows: "Provided, however, that he is not a militiaman, special police officer or deputy marshal in the employ of corporations or individuals during strikes, lockouts or other labor difficulties, and any member occupying any of the above positions shall be debarred from membership." If the revision of December 4, 1899, is correct and was the constitution of this local union at that time this so-called "militia clause" was in force when the plaintiff joined the union as an apprentice, and had been for nearly a year. In his brief the plaintiff's attorney states that he wishes to procure a decision upon the broad ground that the provision of the defendant's constitution in regard to the exclusion of a militiaman is void. To determine this motion it is not necessary for the court to pass upon this particular question or to declare whether it is void or otherwise, because the fundamental and primary object of a temporary injunction is to stop the mischief complained of pending the action, and keep things as they are until the final hearing, when the questions involved may be finally disposed of and full justice done to all parties interested. Therefore the determination of this question should be left to the trial court, and in this controversy the court will only endeavor to discover whether the plaintiff has established facts which entitle him to an order stopping the mischief pending the action.

In National Protective Association v. Cumming, 170 N. Y. 315, it was said: "The propositions quoted recognize the right of one man to refuse to work for another on any ground that he may regard as sufficient, and the employer has no right to demand a reason for it. * * * Their reasons may seem inadequate to others, but if it seems to be in their interest as members of an organization to refuse longer to work, it is their legal right to stop. The reason may no more be demanded, as a right, of the organization than of an individual, but if they elect to state the reason their right to stop work is not cut off because the reason seems inadequate or selfish to the employer or to organized society." If this reasoning be correct and there is no limit upon the causes which may actually exist or be assigned for the refusal of one man to work for another, the reason assigned in the notice served upon Sheffer & Barry would not be illegal and

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would not give the plaintiff a cause of action. Plaintiff's attorney argues that the "militia clause" means "hostility to the public defense" and "trenches upon the efficiency of the military power" and makes the plaintiff "the champion of the sovereignty of the State." If called upon to pass upon this question upon the affidavits presented, I should be unwilling to assent to this. It may be thought by some that the "militia clause" in this constitution is ill-advised and unwise, but, however this may be, nothing in the constitution, notice or application blank leads me to conclude that the union is either "hostile to the public defense" or that it "trenches upon the efficiency of the military power of the State," or that, as against its attitude, the plaintiff is the "champion of the sovereignty of the State."

But it occurs to me that the one thing to discover in order to determine whether or not this temporary injunction should be continued, is the question, was the plaintiff ever a member of the union in "full membership." According to his own affidavits and statements he received but one card of membership and that was given to him as an apprentice. The transition from the condition of an apprentice member to full membership is not very plain. By the provisions of section 3 of article 9, "Apprentices on completion of their apprenticeship will be entitled to full benefits and all the rights of full membership by conforming to article 8 of section 1." At the time the plaintiff had completed his term of apprenticeship and according to the revision of December 4, 1899, when he commenced it, and became entitled to full membership the "militia clause" was in section 1 of article 8, and barred him from becoming a full member. It does not appear from the affidavits nor from the constitution that there is any fixed ceremony to go through in order to pass from an apprentice member to journeyman member, and if there is any it does not appear that the plaintiff ever went through that ceremony or received any paper or card indicating that he is or ever was a journeyman or full member. If there is no such ceremony required the fact still remains, according to the proof, that he never received any card other than the apprentice card, and it also appears, if his own story is to be taken as true, that he joined the union under the provisions of the constitution which came down from the Brotherhood of Painters and Decorators, and at that time no card was issued to apprentices, which would

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tend to show that he never had a card of any description. The rules providing for the issuing of cards to apprentices are found only in the constitution of December, 1901. There was no provision in either of the earlier constitutions for the issuing of cards to apprentices so that it seems hardly probable that he received a card at the time he joined.

It is said by the plaintiff's counsel that the defendant is estopped from denying that he was in full membership, because of their notice, which assumed that he was in full membership and which would have been unnecessary were he not a full member. Perhaps this would be true if all of these facts did not appear from the plaintiff's own showing, but they do. However, the notice does not go to the extent of admitting that the plaintiff was ever a full member and so far as it reads it might as well apply to him as an apprentice member as a journeyman member. It is argued that if the plaintiff joined the union as an apprentice before the "militia clause," that he should not be barred by the insertion of it subsequently. This it is not necessary to determine. The question is, was he ever a member in full standing, because by the injunction the union is required to grant him and accord to him the privileges of full membership and is required to grant him a full membership card, and if he was not a full member, no matter whether he should have been or not, he cannot by injunction be reinstated if he never were instated. And the defendant vigorously disputes his ever having been a full member or ever having had a membership card, and in support of this submits the affidavits of the recording secretary, the conductor, the financial secretary and the treasurer of the union, showing that they have the care and custody of the books and papers and are required to perform the duties connected with the matter of recording the entrance of members, the issuing of cards, the payment of dues, etc., in which they positively deny that the plaintiff was ever a full member or ever had a membership card. This seems to be again corroborated by a circumstance related by the plaintiff in his own affidavit in which he states that he received only two dollars a day. This appears to be forty cents a day less than a journeyman was receiving and would lead to the conclusion that he did not regard himself as a journeyman.

All this leads me irresistibly to the conclusion that the plaintiff has asked for more than he is entitled to and that to attempt

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to reinstate him into a condition in which it is at least doubtful whether he ever was and which might result in mixing and complicating the situation, would be unwise. It also occurs to me that this is a contest over a principle, that being to determine the validity of the "militia clause," and that the loss of the plaintiff's wages pending this controversy is a slight consideration compared with the real purposes of the suit.

The rights of the plaintiff must be clear in order to entitle him to a temporary injunction. I think upon his own showing his position is full of doubt, and the defendant's affidavits and statements add to the doubt. This is an unusual law suit and the plaintiff's rights, to my mind at least, are not entirely clear.

Therefore the temporary injunction should be vacated and an order may be entered accordingly, with ten dollars costs.

Temporary injunction vacated, with ten dollars costs.

JOHN S. BUDD, Plaintiff, *v.* THE HOWARD THOMAS COMPANY, Defendant.

(Supreme Court, Schuyler Special Term, February, 1903.)

Pleading — Demurrer to complaint for insufficiency — Principal bound by agent's acts.

Upon a demurrer to a complaint upon the ground that it does not state facts sufficient to constitute a cause of action, the question is not whether it contains redundant or irrelevant matter but whether it contains averments which go to make up a complete cause of action.

A demurrer admits the truth of all the facts stated in the complaint.

Every intendment and inference which can be derived from the complaint must be used to sustain it.

Where the principal accepts the fruits of his agent's contract he is bound by all the instrumentalities through which the benefit was obtained.

DEMURRER to complaint.

Frank W. Fiero, for plaintiff.

J. W. Barrett, for defendant.

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FORBES, J. This is an action to recover for services rendered and performed and for money advanced by the plaintiff for the defendant in the purchase and shipment of six carloads of plums. The defendant is a domestic corporation, duly incorporated under the laws of the State of New York, located and doing business as "packers of canned fruits and vegetables," at Fairport, N. Y.

In the month of August, 1901, the defendant, by its agent, one Foley, entered into an agreement with the plaintiff for the purchase of several carloads of plums, to be bought and shipped by the plaintiff, in the vicinity of Hector, Schuyler county, N. Y. Foley was to assist in the loading of said fruit in the cars at Burdette and Hector stations on the Lehigh Valley railroad. In consideration of such services, to be performed by the plaintiff, he was to receive, and the defendant was to pay said plaintiff for his services a commission of one-fourth of one cent a pound for all plums so purchased and loaded upon the cars at said stations. By the terms of said agreement and under the same the plaintiff did purchase and load, with the assistance of said agent, six carloads of plums, and the same were delivered at said stations in the town of Hector, between the 31st day of August and the 7th day of September, 1901, inclusive. Said cars contained in all 153,396 pounds of plums. The defendant thereafter received from and accepted the same of the plaintiff. The defendant advanced to the plaintiff, at various times, sums of money to the amount of $2,700, with which to pay for said plums so purchased and towards his commissions thereon under said agreement. On or about the 31st day of August, 1901, the railroad company refused to bill and forward said plums to the defendant, unless the freight and other minor expenses thereon were prepaid. The defendant's agent, Foley, then and there authorized and directed the plaintiff to advance the money with which to pay said freight bills and other expenses, for the purpose of preserving and forwarding said plums to the defendant. The plaintiff thereupon did prepay said freight and the other expenses, upon said shipment, in the sum of $300.85 over and above the amount of money then in the plaintiff's hands. The purchase price of said plums, the freight bills and other expenses, paid by the plaintiff, together with the plaintiff's commissions on said purchase, amounts to the sum of $3,000.85, as the same was computed and

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adjusted by the plaintiff and said Foley as the agent of said defendant. This computation was made and the balance was fixed and agreed upon by the plaintiff and the defendant's agent on the 7th day of September, 1901. This computation, so made, left a balance due and owing to the plaintiff from the defendant of $300.85. This amount was adopted by the defendant, through its agent, and he then and there agreed that the defendant should pay the plaintiff the sum of $300.85, as the same was found due from the defendant to the plaintiff. These facts are shown by the complaint and are admitted to be true. The plaintiff then demands judgment against the defendant for the balance so computed and found to be due, with interest thereon from the 7th day of September, 1901, beside the costs of this action.

This action was commenced on or about the 11th day of August, 1902, by the service of the summons and complaint on the defendant corporation. On or about the 18th day of September, 1902, the defendant, by its attorney herein, demurred to said complaint, and avers, as the only ground, that it appears upon the face of said complaint that it does not state facts sufficient to constitute a cause of action.

Section 488 of the Code of Civil Procedure, subdivision 8, provides: "The defendant may demur to the complaint, where the complaint does not state facts sufficient to constitute a cause of action." Section 490 permits this subdivision to be stated in the demurrer, in the language of the subdivision, without particularly pointing out the specific grounds of demurrer.

Many decisions can be cited showing that the complaint is sufficient where the facts alleged therein are stated in a plain and concise manner and a demand for judgment thereon is contained in the complaint. The demurrer to the complaint is an admission that all the facts therein stated are true. Code Civ. Pro., § 481; Williams v. Conners, 53 App. Div. 601.

If any cause of action is set forth in the complaint the demurrer must be overruled. Every conclusion, inference and intendment in the complaint must be used to maintain the integrity of the complaint and the cause of action therein contained.

In a demurrer, on the ground of the insufficiency of the complaint, the question is not whether the pleading contains redundant or irrelevant matter, but whether the complaint contains averments which go to make up a complete cause of action. The

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pleadings are not to be interpreted strictly against the pleader, but allegations which indicate the nature of plaintiff's claim are sufficient if under them the plaintiff would be entitled to give the evidence necessary to establish his cause of action. Waite v. Aborn, 60 App. Div. 524.

Every intendment and every inference which can be drawn or implied from the complaint must be used to sustain the pleading. Marie v. Garrison, 83 N. Y. 23; Milliken v. Western Union Tel. Co., 110 id. 403; Sanders v. Soutter, 126 id. 193; Johnson v. Golder, 132 id. 116; Kain v. Larkin, 141 id. 144; Sage v. Culver, 147 id. 241; Coatsworth v. Lehigh Valley R. Co., 156 id. 451; Abbey v. Wheeler, 170 id. 127; Roberson v. Rochester F. B. Co., 171 id. 553. The last two cases cited hold: "The facts contained within these allegations must be regarded as admitted, under the defendant's demurrer, as must all other facts which can be implied by reasonable and fair intendment. If the facts alleged in the complaint justify a recovery, either at law or in equity, it cannot be held that the demurrer is well taken, although the pleading may be open to correction by motion or otherwise. It may be that in this case the facts are not stated in the complaint with that precision and in the logical order which is said to be requisite, or desirable in good pleading. But where there are facts enough alleged to entitle the plaintiff to a hearing in a court of justice, the pleading will be held to state all the facts that can be implied from its allegations, by reasonable and fair intendment, and the facts so pleaded are traversable in the same manner as though directly and explicity stated." The same doctrine is held in Williams v. Conners, 53 App. Div. 601; Fogarty v. Wanamaker, 60 id. 434.

I think the learned counsel for the defendant does not give full credit to all of the allegations of the complaint. First, the incorporation of the company is admitted. From its business and location, it is clearly shown that it is a domestic corporation, doing business within the State of New York. The contract was made with the defendant's agent in the month of August, 1901. The kind of work to be done and the manner in which it was to be performed is fully set forth in the complaint. The price to be paid, by the defendant to the plaintiff, for the work done, is made definite. The contract to advance money to pay freights and expenses is pleaded. The advance and payments made by

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the plaintiff by and upon the authority of the defendant's agent are shown. The purchase of the plums; the delivery upon the cars and the payment by the plaintiff therefor out of the money furnished by the defendant for that purpose are alleged. The shipment of the goods by the plaintiff and their receipt and acceptance by the defendant are alleged in the complaint. The amount and value of the goods purchased, shipped, received and accepted are fully alleged. The amount paid out by the plaintiff and expended for the defendant is clearly alleged. The examination of the amounts paid out and expended, and the amounts due for commissions to the plaintiff from the defendant for the work done are alleged and admitted, and that the amount, so stated, left a balance due and unpaid for commissions, services and money advanced is alleged. That the sum of $300.85 was due and owing to the plaintiff from the defendant after the goods had been accepted by it on the 7th day of September, 1901, is pleaded; then judgment is demanded for that amount, with interest from the 7th day of September, 1901, beside the costs of this action.

The complaint then, taken as a whole, shows first the agreement and the several sums to be disbursed under that agreement. That the plaintiff entered upon the service and fully performed the services under that agreement. That when so fully performed, the amount due him for money advanced and commissions unpaid was computed, agreed upon as due and owing from the defendant to the plaintiff, and a promise was made to pay that balance.

The defendant's attorney clearly overlooks the fact that by his demurrer he has admitted that Foley was the defendant's agent, that he was present during the time the contract was being performed, that he asked for the advancement of the funds, as the agent of the defendant and for the defendant. That the shipments were made upon and in the performance of this service; that the money was advanced to pay freight; that the goods were received and accepted by the defendant, thus fully ratifying the contract of the agent with the plaintiff, under the agreement that there was due and owing to the plaintiff from the defendant the balance claimed in the complaint.

It is a principle of law that where one party deals with the agent of another party, and the principal adopts and accepts the fruits of the contract so made, he is bound by all of the

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instrumentalities by and through which the benefit is obtained. Bennett v. Judson, 21 N. Y. 238; Rumsey v. Briggs, 139 id. 331. I do not think the case at bar falls within the case of Tracy v. Tracy, 59 Hun, 1.

The complaint when carefully scanned is good within Lent v. N. Y. & M. R. Co., 130 N. Y. 504. The question in the last-cited case turned upon the preliminary entering of the order. That fact was not pleaded and nothing became due or payable in that case until the entry of the order upon the award.

In the case at bar the complaint shows affirmatively that the amount was due and owing to the plaintiff. The Rogers Case, 166 N. Y. 381, is not in point.

This is an action for work, labor and services done and performed, to be paid for by certain commissions; and for money advanced, paid out and expended to and for the use of the defendant, at his request. The law implies that services sought are to be paid for, and that the money so advanced and expended, upon a request for the defendant's benefit, was to be repaid to the plaintiff.

The complaint as a whole clearly shows a good cause of action.

The demurrer must be overruled, with costs, with leave to the defendant to answer within twenty days after the entry and service of the interlocutory judgment.

Demurrer overruled, with costs, with leave to defendant to answer within twenty days after entry and service of interlocutory judgment.

HARRIET C. PERRY, Plaintiff, *v.* GEORGE R. WILLIAMS, Impleaded, Etc., et al., Defendants.

(Supreme Court, Tompkins Special Term, February, 1903.)

Reformation for mistake — Statute of Limitations — A personal defense.

An action to cancel a discharge of a mortgage, covering fifty acres and separately twenty-seven acres, and reform it so that it releases only the twenty-seven acres, brought upon the ground that the party executing the discharge intended to release and supposed she was releasing only the twenty-seven acres, is not barred by the ten years'

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Statute of Limitations nor until the said party has knowledge that she has made the mistake.

Where the present owner of the fifty acres, made a defendant, is not in privity with the plaintiff and was not a party to the discharge, he cannot plead the statute and particularly where he had notice or knowledge of the existence of the mortgage on his parcel at the time when he acquired his interest.

ACTION to set aside and cancel of record the discharge of a mortgage and to reform said instrument.

R. R. Moss (Richard H. Thurston, of counsel), for plaintiff.

S. Edwin Banks (J. T. Newman, of counsel), for defendant Williams.

FORBES, J. This is an action to set aside and cancel of record the discharge of a mortgage and to reform said instrument as and for a release of said mortgage covering two parcels of land, of which it is claimed only the twenty-seven-acre piece was to have been released. This mortgage was for $800, given by Jerome Rowe to Josephine Holmes, dated April 1, 1861; it was assigned by Josephine Holmes to Margaret Archer April 1, 1871; and reassigned to the plaintiff Harriet C. Perry by Nathaniel Archer, as the executor of the last will and testament of Margaret Archer, deceased, April 1, 1887, and was recorded January 4, 1888, in Liber I of Mortgages, page 336. This mortgage was, in form, discharged of record by the plaintiff, December 23, 1887, recorded January 4, 1888, in volume 7 of Discharge of Mortgages, page 36.

Fannie P. Rowe became the grantee of the twenty-seven-acre parcel from F. J. Whiton, by deed dated December 23, 1887; Mr. Whiton having purchased the twenty-seven-acre piece under a foreclosure of a small mortgage held by the Coon estate, which Van Cleef foreclosed.

Defendant Williams is a trustee under the will of John Southworth, deceased. Williams as trustee became the owner and holder of a subsequent mortgage, dated May 1, 1861, executed by Jerome Rowe to Maria J. Hanmer, for $833.33, covering the fifty-acre lot. This was assigned to Williams by the holder, one Van Duzen, June 27, 1894. George Williams, as trustee, fore-

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closed the Hanmer mortgage by a judgment of sale on the 19th day of May, 1900, after the mortgage in question had, in form, been satisfied and discharged.

The principal question for examination is the ten-year bar of the Statute of Limitations, pleaded as a defense to a recovery in said action, so far as the more important legal proposition in this action is involved.

It is held in the case of Oakes v. Howell, 27 How. Pr. 145, "An action to reform a contract or instrument in writing for the sale of lands, on the ground of mistake, accident or inadvertence, is barred by the ten years Statute of Limitations from the time the cause of action accrued; and not, as in cases of fraud."

In the case of Hoyt v. Putnam, 39 Hun, 402, it is held that an action to reform a deed must be brought within ten years, when a party cannot recover land conveyed without first having his deed reformed.

In Sprague v. Cochran, 70 Hun, 512, it is held that the Statute of Limitations is a bar to an action to reform a mortgage, when the action is brought after ten years, to make, by parol evidence, said mortgage an equitable lien on land. But this case was reversed (see 144 N. Y. 104) upon the ground that the action was a continuing remedy, and also that that defense had been stricken from the pleading.

In Exkorn v. Exkorn, 1 App. Div. 124, it was held: "An action brought to reform a deed by inserting the plaintiff's name in the deed as a co-grantee with the defendant, resting solely upon the ground of mistake, is barred by the ten-year Statute of Limitations. The provisions of Code of Civil Procedure (§ 382, subd. 5), that in certain cases the cause of action is not deemed to have accrued until the discovery by the plaintiff of the facts constituting a fraud, is limited entirely to cases of fraud, and no such rule is applicable to a case where the action is based simply on a mistake."

In the case of Campbell v. Culver, 56 App. Div. 591 (4th Dept.), it is held: "Where the plaintiff's action is founded upon a breach of contract and not upon fraud, the provision of subdivision 5 of section 382 of the Code of Civil Procedure, declaring that in certain cases a cause of action is not deemed to have accrued until a discovery by the plaintiff of the facts constituting the same, has no application." If these authorities are in

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point and apply to the case at bar, this action probably could not be maintained. There is still another class of cases that may be applicable:

In Gallup v. Brend, 132 N. Y. 370, it was held: In an action, commenced in 1887, to recover an alleged balance unpaid of the purchase price of a farm sold and conveyed in 1880, by plaintiff, to the defendant, the defendant set up as a counterclaim, and the referee found in substance that the sale was by the acre, that plaintiff represented that there were 230 acres in the farm, whereas there were only 211 acres, the plaintiff having paid for 230 acres. The plaintiff did not discover the discrepancy until shortly before the commencement of this action. The referee found that the agreement was the result of a mutual mistake. The defendant demanded a reformation of the contract and an allowance for the deficiency. It was held that the ten-year limitation applied and that the defendant was entitled to the relief sought.

Bartlett v. Judd, 21 N. Y. 200, was an action of ejectment for land claimed to be conveyed by a sheriff's deed upon sale under execution. A sheriff's deed of land "conveyed by A. B." to the defendant, was construed as covering land conveyed to the latter, through mesne conveyance, by A. B.'s grantees. The sheriff's deed was reformed in accordance with the facts, and the demand of the defendant in his answer. "The Statute of Limitations, if ever a bar to such relief upon the application of a defendant, does not commence running until he is charged with knowledge of the plaintiff's assertion of a claim, under the deed, inconsistent with the actual exception made at the sale."

Miner v. Beekman, 50 N. Y. 337, was an action by an owner in relation to real property, held by a mortgagee in possession, seeking for an accounting, and for liberty to pay the amount ascertained to be due upon the mortgage, and upon that payment to be let into possession. Held, that the action is not embraced within the ten-year limitation.

In Reitz v. Reitz, 80 N. Y. 538: "This action was commenced in 1867. The lands were conveyed to defendant in 1854; his mother, for whom he acted as agent, and with whose money he made the purchase, died in 1866. Defendant did not assume to own the property or deny her right thereto until after her death; and she had no knowledge that the deed had been taken in his name. Held, that, until the happening of one or the other

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of these events, the cause of action did not accrue; and that, therefore, the action was not barred by the Statute of Limitations."

Perrior v. Peck, 39 App. Div. 390, is an action where a grantee in possession of land under a deed set up a defense in an action of ejectment attacking the title and sought a reformation of his conveyance. "In such a case the Statute of Limitations does not begin to run against his right to a reformation of his deed until he knows of the distinct flaw in the deed or becomes cognizant of the adverse claim." The mistake was made by the scrivener. This case was affirmed in 167 N. Y. 582.

The case of Sprague v. Cochran, *supra,* was reversed in 144 N. Y. 104, the doctrine of the Statute of Limitations was not passed upon, still the court said: "Even if that feature of the case still remained the Statute of Limitations would probably be a sufficient answer."

In De Forest v. Walters, 153 N. Y. 229, the defendants set up certain facts as a defense and as a basis for reforming a defective deed. The court held: "In such an action, and under such circumstances, it has been held that the Statute of Limitations, if applicable at all, does not begin to run until the party against whom it is invoked is charged with knowledge of an assertion of some adverse claim under the deed." Page 241.

It will be seen that in the last cited authorities the question turned upon the continuing right of action, and in such cases it was held that the statute did not commence to run nor did the action accrue until the party aggrieved had knowledge that a mistake had been made in the instrument sought to be reformed.

The plaintiff claims that the defendant Williams and his *cestui que trust* were not parties to the discharge of the mortgage in questions, and are not in privity with the plaintiff. That, therefore, the Statute of Limitations does not apply, since the statute is a personal defense of the party aggrieved and cannot be taken advantage of by another, since the party aggrieved has the right to waive that defense, if he choose, or may adjust the demand in any manner in which he may see fit.

There is a class of defenses which is personal, and these defenses cannot be successfully interposed by any one save the party or some one in privity with him. Such is the defense of usury. So it is held in Sands v. Church, 6 N. Y. 347: "Persons who accept a lien upon, or interest in, the equity of redemption of

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mortgaged premises, as mortgagees or purchasers, expressly subject to the lien of the prior mortgage, cannot avail themselves of usury in such mortgage, in defense to a suit for its foreclosure."

In Williams v. Tilt, 36 N. Y. 319, it is held: "A usurious agreement cannot be assailed by one not a party to it, or not claiming under the party injuriously affected by it." The opinion in this case gives a variety of illustrations.

In Amherst College v. Ritch, 151 N. Y. 282, 335, is another illustration of the doctrine, where it is held: "The state through its attorney-general cannot by legal proceedings raise the question or prevent the gift from taking effect in accordance with the wishes of the testator. The rights springing from the statute are personal, the same as the rights of a borrower under the Statute of Usury, and they can be waived or relinquished in the same way." Citing Williams v. Tilt, *supra*.

In Chapuis v. Mathot, 91 Hun, 565, it is held: "The right to set up usury is personal, and the usurious contract is only avoidable by the borrower, and those in privity with or claiming under him." This case was affirmed in 155 N. Y. 641, on the opinion below.

In Laux v. Gildersleeve, 23 App. Div. 352, it is held: "The defense of usury is available not only to parties, but also to privies to a contract of guaranty, in an action brought upon a note given as a substitute for, or in renewal of, the guaranty, but where the defendants, although aware of the existence of the defense, fail to plead it, it must be considered to have been waived by them."

In East River Nat. Bank v. Adams, 21 N. Y. St. Repr. 880, it is held: "The defense of usury is available only to the debtor, and cannot be raised by creditors of such debtor."

In the case at bar, the defendant Williams took an assignment of a subsequent mortgage covering the fifty acres of land also covered by the plaintiff's mortgage. The plaintiff's sister, Mrs. Fannie P. Rowe, purchased the piece containing the twenty-seven acres, and it is asserted that the agreement was that the plaintiff was to release from the operation of her mortgage in question the twenty-seven acres owned by her sister. Said mortgage standing in plaintiff's name and covering both premises — the fifty and the twenty-seven-acre pieces. An instrument was drawn by George B. Davis, acting as attorney for Caroline Rowe, sister of

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the deceased mortgagor, who was the husband of Fannie P. Rowe. This paper was presented at the window of the post-office for the plaintiff to sign and acknowledge. She claims that she did not read it, nor did she know its contents, except as they were stated by Mr. Davis. This instrument now turns out to have been an absolute discharge of the mortgage as a security on the fifty-acre piece covered by the subsequent mortgage, assigned to the defendant Williams and by him foreclosed. The plaintiff claims that she did not discover the mistake in the instrument or its nature, but supposed and believed that the instrument was only a release of the twenty-seven acres owned by her sister. The records show the discharge and cancellation of the entire mortgage as a lien upon the premises, and that record was known to the defendant Williams when he took the subsequent mortgage.

Plaintiff contends, and it is supported by sufficient evidence in that contention, that Williams knew at the time he took the subsequent mortgage that the plaintiff's mortgage was still a lien upon said premises. This fact was disclosed to him by her sister, Fannie P. Rowe, who introduced Caroline Rowe to the defendant Williams. This evidence is also supported by the subsequent declaration of Williams to the plaintiff and Mr. Moss, who were witnesses on the trial; and while Mr. Williams seeks to deny any knowledge of a prior mortgage, except as he found the same upon the record and discharge, his cross-examination and a letter written by him October 19, 1893, to Mr. Van Duzen, the assignor of the mortgage to Williams, show that there is serious doubt about the version which he gives of the transaction concerning his knowledge of the plaintiff's mortgage.

While the defendant Williams admits that the fact of the existence of the mortgage was communicated to him at some time, he insists that it was after the mortgage had been purchased by and assigned to him. He bases that recollection upon the theory that he had never seen the witness Fannie P. Rowe until subsequent to that time, but he admits the introduction by Fannie P. Rowe of Caroline Rowe to him.

After the letter was shown to him and his attention was called to the date, he would not swear positively that the conversation was after the mortgage was taken by him; and, indeed, in the letter he writes that, before the mortgage was transferred, Caroline Rowe had been at his office; and I think he was honestly

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mistaken about the time. The fact was communicated to him, and that his subsequent examination of the record was relied upon by him in taking said mortgage, and he had probably forgotten the conversation with Caroline and Fannie Rowe, who were sisters-in-law. Caroline subsequently died.

If the doctrine that the defense interposed is personal, and cannot be raised by the defendant Williams, in my view of the evidence given on the trial, a judgment should be ordered for the plaintiff for the relief demanded in her complaint; and judgment is ordered accordingly, with costs.

Judgment accordingly.

Matter of the Appraisal of the Property of DAVID WOLFE BISHOP, Deceased.

(Surrogate's Court, New York County, February, 1903.)

Transfer tax — Duty of an executor to testify as to assets of his testator — Contempt.

Until it has been decided, or is conceded, that a decedent was at the time of his death a non-resident of the State of New York, an executor of his will is guilty of a contempt in refusing to answer, at an appraisal to fix the transfer tax upon his estate, questions as to assets thereof which would be taxable if he died a resident of this State but which would otherwise not be taxable.

PROCEEDINGS upon the appraisal of the property of decedent.

James J. McEvilly, for State Comptroller.

Parsons, Closson & McIlvaine, for executors.

THOMAS, S. The duty imposed upon the appraiser is to fix the fair market value of the property of the decedent which is subject to the payment of any tax imposed by article X of the Tax Law (§ 230). For that purpose he is authorized to issue subpœnas and to compel the attendance of witnesses before him, and to take the evidence of such witnesses under oath concerning such property and the value thereof (§ 231).

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The contention of the executors is that the decedent was, at the time of his death, domiciled in the State of Massachusetts, while counsel for the State Comptroller argues that he was a resident of this State. Some evidence on this issue has been offered by both sides, and only part of the record is before me on this application. An executor was sworn as a witness and refused to answer certain questions as to assets of the decedent which would be taxable if he was a resident of this State, but which would not be taxable if he was a nonresident. The present application is to punish him for contempt. The executor is in error in supposing that the evidence offered by him of the nonresidence of the decedent is conclusive. All of that evidence concerned acts and declarations of the decedent which might have been done and made to create an apparent residence in Massachusetts for the sole purposes of taxation, while an actual and beneficial residence in New York, for all other purposes, was still retained, and it is subject to rebuttal. The question of domicile can seldom, if ever, be said to be conclusively and finally established by any one declaration, or any series of declarations, so as to preclude evidence of other facts. The appraiser had jurisdiction to determine the place of domicile of the decedent, as an incident to his power to assess only those assets which are taxable under the law, but he cannot be required to announce his decision in installments or coerced as to the order of the proof to be taken before him. Until he has decided that the decedent was a nonresident of this State, or until that fact is conceded, questions as to assets taxable on the theory that the decedent was a resident of this State are "legal and pertinent."

The direction of the appraiser that the witness prepare and produce a list of assets was in excess of his powers. All that the witness is obliged to do is to answer pertinent questions, and the making of lists is not one of his duties. Neither can a witness be punished for failure to produce books and papers not presently in his possession or under his control at the place of trial, by an oral direction of the appraiser. Such a direction is not an equivalent to a subpœna *duces tecum* under section 231 of the Tax Law, and section 856 of the Code of Civil Procedure. The question put as to "what stocks are they?" to-wit, what stocks of corporations not organized under the laws of the State of New York, were owned by the decedent at the time of his death, was

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pertinent and proper, and the witness can be dealt with on this application for his refusal to answer it.

An order will be made that a warrant to commit the witness issue, in the form prescribed by section 856 of the Code of Civil Procedure, if he fails to appear before the appraiser within five days and answer this question.

Decreed accordingly.

Matter of the Estate of RANSOM L. POND, Deceased.

(Surrogate's Court, Otsego County, February, 1903.)

Compulsory accounting of executors — Statute of Limitations as affected by infancy — Code Civ. Pro., §§ 382, 396, 414.

The fact, that more than six years have elapsed since accrual of the right to compel executors to account, does not bar an infant legatee and heir-at-law of the decedent from having such a proceeding taken in her interest, and this because the time of the disability arising from her infancy is not a part of the six years and the statute has never begun to run against her.

PROCEEDING to compel executors to render their accounts for judicial settlement.

L. F. Raymond, for petitioner.

C. C. Flaesch, for executors.

WILLIS, S. This proceeding was commenced by a verified petition presented to this court by Maria W. Youmans, in behalf of Mary Ella Wendell, an infant of the age of fifteen years. The petition, among other things, states that the said Maria W. Youmans is a grandmother of the said infant, that the said infant resides with said Maria W. Youmans, and that the said infant is a granddaughter, legatee and heir-at-law of said Ransom L. Pond, deceased, and is interested in the estate of said decedent.

The executors have appeared herein, and filed a verified answer, by which none of the allegations contained in the petition are put in issue. As their sole defense herein they allege: "That the cause of action in this proceeding alleged in said petition,

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did not accrue within six years before the commencement of this proceeding, and that this proceeding is, therefore, barred by the six years' Statute of Limitations, and cannot be maintained."

The same rule of limitation applies to this proceeding as in an action. Church v. Olendorf, 19 N. Y. St. Repr. 700; Matter of Rogers, 153 N. Y. 316.

The chapter of the Code relating to the subject is entitled "Limitations of the time of enforcing a civil remedy," and by section 414 it is expressly applied to a special proceeding. Therefore, while the provisions of section 382 of the Code of Civil Procedure require a proceeding of this nature to be commenced within six years from the time when the right to institute the same accrues, yet in this proceeding the facts stated in the petition bring the case within the provisions of section 396 of the Code of Civil Procedure, which provides that: "If a person, entitled to maintain an action specified in this title * * * is, at the time when the cause of action accrues, within the age of twenty-one years * * * The time of such a disability is not a part of the time limited in this title for commencing the action." The person in whose behalf the petition is presented herein being within the express exception of the statute by reason of her infancy, it follows that the Statute of Limitations has never commenced to run as against this infant, and affords no answer, whatever, in this proceeding. Matter of Rogers, 153 N. Y. 321.

No reason appearing why these executors should not render an account of their proceedings, an order may be entered directing said executors to file their account in this court.

Decreed accordingly.

Matter of the Judicial Settlement of the Accounts of CHARLES S. BRINTNALL, as Executor of the Last Will and Testament of CATHARINE TOOHEY, Deceased.

(Surrogate's Court, Rensselaer County, February, 1903.)

Administration — Assets in the hands of one, named executor, before the death of his testatrix — Interest and commissions.

Money, which a person received from a woman upon the day before her death when she made her will and nominated him her executor,

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remains, where he claims no gift, her money and is, in his hands, assets to be distributed according to the will.

Where he, upon the day of her death, deposited the money in his own bank account and spent it before her will was proved, the surrogate charged him with the fund, less disbursements, and legal interest but did not refuse him commissions because of such deposit.

PROCEEDINGS upon the judicial settlement of the accounts of an executor.

Charles S. Brintnall, executor, in person.

Toohey & Hickey (John T. Norton, of counsel), for legatees.

Calvin S. McChesney, for bondsmen on official bond of executor.

James W. Coffey, for Catherine Shea, a creditor.

HEATON, S. Judicial settlement of executor's accounts. The facts are the same as when the residuary legatees applied under section 2722 of the Code of Civil Procedure for an order directing payment on account of their residuary shares, with the additional facts now proved that when the executor withdrew the funds from the bank on the order of Mrs. Toohey before her death, he immediately deposited substantially all of such money in the same bank in his own name, and that such money so deposited was all drawn and spent by the executor before the will of the deceased was probated.

We then have this state of facts: A person named as executor in a will is given, at the same time when the will is executed, a bank-book and an order upon a savings bank authorizing him to draw all the fund on deposit which is practically the maker's whole estate; on the next morning he presents the book and order and is paid such moneys, and immediately deposits them in the same bank in his own name; the testatrix dies in the afternoon of the same day. Is the executor accountable for such money?

If the acts of the parties established a gift of the bank-book and deposit, then surely the same was fully executed and the

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money in the actual possession of the donee before the death of testatrix and the executor could not be charged therewith on this accounting. Matter of Kellogg, 104 N. Y. 648. There is no claim by the executor that the money was a gift, and there is no evidence in the case tending to prove a gift.

The executor admits that he is liable for the money so withdrawn by him but claims that he is liable as a debtor and not as executor.

The facts as proved here do not establish a loan, and, therefore, the executor cannot stand to the legatees in the relation of a simple debtor to the estate. The fund came rightfully into his possession before the death of the testatrix. But if the transaction was neither a gift nor a loan, then the money still remained the money of the testatrix, notwithstanding the transfer of the same to the person she had just nominated as her executor. Had he squandered it before her death, perhaps a different question would present itself for solution. But the evidence is that practically the whole fund was in his possession at the time of her death, and by whatever means it came to him, it was then his duty as her nominated executor to preserve it for distribution at the proper time according to the directions of her will. If it was her money in his possession, he must now account for it, and if it was a debt due from him he must still account for it (Code Civ. Pro., § 2714), together with interest at six per cent. Matter of Davis, 37 Misc. Rep. 326. The surrogate has jurisdiction to determine this question upon an accounting. Merchant v. Merchant, 2 Bradf. 432.

An executor must account for all of the assets of his testator's estate which are in his possession or under his control, and the jurisdiction of this court is sufficient to enable us to probe his transactions with any one and to adjudge that property acquired by him, either with or without the assertion of his authority as executor, is equitably assets in his hands for distribution. Matter of Schaefer, 34 Misc. Rep. 34.

In many points this case is similar to Matter of Ammarell, 38 Misc. Rep. 399, where an executor was surcharged with certain bonds and mortgages assigned to him by the deceased.

It appears from the account and vouchers that the account should be adjusted as follows:

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Bank deposit charged to executor		$1,074 75
Household furniture charged to executor		30 00
Total		$1,104 75
Household furniture delivered to legatees	$30 00	
Funeral expenses paid	147 74	
Debts paid	95 75	
		273 49

These payments were made from time to time to August 12, 1899.

Balance charged to executor $831 26

To which add interest at six per cent. from August 12, 1899, to date, and deduct commissions on the total amount of the estate, including the interest, less thirty dollars, value of specific articles bequeathed.

Neglect of duty will not deprive an executor of commissions, but if he owes the estate the same must be applied upon his debt. Ward v. Ford, 4 Redf. 34.

Let the executor be credited with actual disbursements for serving citations on this accounting.

Mrs. Shea, an alleged creditor, appears on this accounting and presents a claim of ninety-three dollars and seventy-five cents for rent of premises consisting of three rooms at four dollars and fifty cents a month, occupied by the executor, containing the household furniture, etc., bequeathed to the residuary legatees. Mrs. Toohey died in January and the rent of the tenement for about two months prior to her death and until August following has been paid by the executor. The present claim is for rent from August 15, 1899, to May 10, 1901, when the executor was evicted. No objection is made to the payment of rent for six months, and it would seem that such a length of time was sufficient for the person named as executor to procure the probate of the will or remove the goods to a less expensive place of storage. But this claim has not in fact been paid and, therefore, it cannot be allowed to the executor on this accounting. Code Civ. Pro., § 2730; Matter of Blair, 49 App. Div. 417.

Let a decree be entered accordingly.

Decreed accordingly.

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Misc.] Court of General Sessions, New York County, February, 1903.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff *v.* PETER SQUAZZA, Defendant.

(Court of General Sessions of the Peace in and for the City and County of New York, February, 1903.)

Crimes — Capacity of a child, aged eleven years, to commit a crime — Malice — Penal Code, § 19.

A boy aged eleven years cannot lawfully be convicted of manslaughter in the second degree, for having thrown from a roof a brick which killed a person below, where the People give no affirmative proof upon the trial that the boy had capacity to understand his act and knew that it was wrong.

Under the maxim that malice supplies age, the proof of malice must be strong and clear.

MOTION to set aside a verdict.

William Travers Jerome, District Attorney; William Rand, Jr., and Henry R. Gray, assistants, for plaintiff.

Lewis Stuyvesant Chanler and Cæsar B. B. Barra, for defendant.

NEWBURGER, J. The defendant was indicted for the crime of manslaughter in the first degree.

It is claimed that on the 15th day of August, 1902, a child, Ambrose Kerrigan, died as a result of injuries received from a brick thrown from a roof by the defendant herein. On the 21st day of January, 1903, the defendant was placed on trial. It is not denied that the defendant is but eleven years of age. On the trial it was conceded by the defense, that Ambrose Kerrigan, named in the indictment, came to his death by reason of a fracture of the skull caused by a brick. The prosecution then offered evidence to show that the defendant had been warned on several occasions by the mother of the deceased not to throw any pebbles, and that the defendant was about the premises about the time the deceased met with the injuries which resulted in his death.

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The defense was an alibi, and it consisted of proof, that at the time of the alleged commission of the crime the defendant was upon one of the docks in the immediate neighborhood of his home playing with other children.

No evidence was offered by the people as to the capacity of the defendant to understand the act charged against him, nor was there any motion made to take from the jury the case by reason of the failure to offer such proof. The trial resulted in a conviction of the defendant of the charge of manslaughter in the second degree.

The defendant now moves to set aside the verdict upon the ground that it was contrary to law and clearly against the evidence, and upon the further ground of the failure of proof as to the capacity of the defendant to understand the nature of the crime with which he was charged. I propose to consider the latter ground only.

Section 19 of the Penal Code provides: "A child of the age of seven years, and under the age of twelve years, is presumed to be incapable of crime, but the presumption may be removed by proof that he had sufficient capacity to understand the act or neglect charged against him, and to know its wrongfulness." This law seems to have come down to us from the common law, and to have been made a part of the statute law in most of the States. "Convictions have been had of infants between seven and fourteen. But in all such cases the evidence of that malice which is to supply age ought to be strong and clear beyond all doubt and contradiction." 4 Blackst. Com. 23. And Bishop in his work on Criminal Law, states the rule to be: "Under our statute an infant under ten years is incapable of committing crime. From ten to fourteen he is *prima facie* incapable, and during the period last named the same burden is on the people to prove his capability as to prove any other material fact. It must be proved beyond a reasonable doubt. The fact can be no more inferred, without evidence, than can any other material fact. It must be proved by competent evidence."

And Barbour's Criminal Law (Vol. 1, 3d ed., pp. 262, 263), says: "Infants above seven years of age, and under fourteen, are said to be within the age of *possible discretion;* during which time they may or may not be guilty of crime, according to their natural capacity or incapacity. The presumption, where the

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offender is under the age of fourteen, is, that he has not a sufficient sense of right and wrong to be capable of committing crime. But this presumption, like most others, may be overcome by counter evidence, and by circumstances. For the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding. One lad of eleven years old may have as much cunning as another of fourteen; and in these cases the maxim is, that *malice supplies age.*

"With regard to the maxim that *malice supplies age,* it seems agreed among all the writers on criminal law, that before an infant under fourteen is to be presumed capable of committing a crime, the evidence of mischevious discretion should be strong and clear, beyond all doubt and contradiction."

In the case of The People v. Davis, 1 Wheeler Cr. Cas. 230, 231, Recorder Riker instructed the jury that the presumption of law was in favor of an infant under fourteen years of age, that under seven years the law supposed the infant incapable to commit a crime. He is supposed to want discretion to judge between right and wrong; but from that age to fourteen, the law still supposed him innocent, and in order to show his liability for crimes, it was necessary to prove his capacity.

In Angelo v. People, 96 Ill. 209, Mr. Justice Walker says: "There is uncontradicted evidence in the record that plaintiff in error was little more than eleven years of age when the homicide was committed. This evidence was not contradicted, but was virtually conceded by the eighth instruction asked and given for the People. If this was true, and the evidence tended to prove it, the rule required evidence strong and clear beyond all doubt and contradiction, that he was capable of discerning between good and evil; and the legal presumption being that he was incapable of committing the crime, for want of such knowledge, it devolved on the People to make the strong and clear proof of capacity, before they could be entitled to a conviction. This record may be searched in vain to find any such proof. There was no witness examined on that question, nor did any one refer to it. There is simply evidence as to his age. For aught that appears, he may have been dull, weak and wholly incapable of knowing good from evil. It does not appear, from even the circumstances in evidence, that he may not have been mentally

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weak for his age, or that he may not have even approached idiocy.

"The law presumes that he lacked mental capacity at his age, and that presumption has not been overcome by the requisite proof, or in fact, any proof. The court below should therefore have granted a new trial, and erred in refusing it."

I have carefully examined all the authorities and the trend of opinion, both by the text-writers and the decisions, seem to lead to but one conclusion, that in cases against children between the ages of seven and twelve charging them with the commission of a crime, the presumption of incapacity can only be removed by affirmative proof on the part of the prosecution that such child had capacity to understand the act complained of and to know its wrongfulness.

From an examination of the record in this case, there appears to be no evidence of the capacity of the defendant herein to understand the act complained of. The only evidence that was offered by the prosecution of malice or capacity was the testimony of Mrs. Kerrigan, the mother of the deceased, who testified that on several occasions preceding the date of the death of her child, she had warned the defendant, Peter Squazza, to leave the roof, and to stop throwing pebbles, and that to use her own words, he would make no reply but stick out his tongue. This cannot be deemed to be evidence of malice or capacity to understand, but, on the contrary, favors the contention of the defense, that the boy did not realize the nature of the act complained of.

The action of the defendant on the stand; his manner of testifying, and his bearing during the trial, clearly demonstrate that he had neither capacity to understand the nature of his act, nor to realize that he had done wrong. The evidence in this case wholly fails to bring the case within the provisions of the statute.

It is unnecessary to examine the other grounds raised by the defense or to consider the application for a new trial upon newly-discovered evidence.

Verdict set aside and new trial granted.

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FRED A. HOLROYD and HENRY S. EVELINE, Plaintiffs, *v.* THE TOWN OF INDIAN LAKE, Defendant.

(Supreme Court, Fulton Special Term, February, 1903.)

Town — Contract for water-mains and sewers — L. 1900, ch. 451.

A complaint, against a town, by contractors with commissioners of a town water district appointed by the town board under L. 1900, ch. 451, for damages for a breach preventing full performance of a contract for water mains and sewers, is not demurrable by the town upon the ground that the water district created by the act is a municipal corporation and this because the act confers upon the water district no powers of municipal government.

The water district remains an integral part of the town; the town may lawfully incur indebtedness for the water system as a local improvement for the general welfare and may lawfully become primarily liable for the cost, although it is to be assessed ultimately upon the residents of a particular district of the town.

The provision of the said act which confers upon the town board authority to appoint commissioners and, upon them, authority to execute the contract, is legal.

The contract binds the town, although made in the name of the commissioners.

The contract may lawfully provide for sewers as well as water mains.

DEMURRER to complaint in an action for breach of contract.

J. W. Atkinson, for plaintiffs.

Potter & Kellogg, for defendant.

SPENCER, J. On the trial of this issue, the court was requested by both parties to ignore objections in respect to the sufficiency of the pleadings and to decide the case upon the merits. Therefore, I shall consider only those questions which bear upon the right of the plaintiffs to maintain the action; and, for that purpose, shall assume that the facts are properly and sufficiently alleged.

The contract, for the breach of which this action is brought,

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was executed between the plaintiffs and the commissioners of a water district in the town of Indian Lake, appointed by the town board pursuant to chapter 451 of the Laws of 1900. The complaint alleges the proceedings taken to establish the district, the appointment of the commissioners, the execution of the contract, its breach while the plaintiffs were engaged in performance; and, by several counts, demands judgment for the amount earned in partial performance, damages for the breach, and for loss of prospective profits.

The defendant demurs, claiming: (1) That the water district established under the provisions of the act is a municipal corporation; (2) that the water commissioners are officers and agents of such district and not of the town; (3) that if regarded as town officers or agents, the act authorizing their appointment is unconstitutional; (4) that the contract does not purport to be made in behalf of the town and the town is not bound thereby; (5) that the contract is void for including matters not within the scope of the powers of the commissioners.

Confining our attention to these claims made upon the trial, we note that the act (Laws of 1900, chap. 451) providing for the establishment of water districts does not constitute them municipal corporations. No powers of local government are conferred. This seems to be necessary within the provisions of subdivision 1 of section 3 of the General Corporation Law in order to create municipal corporations. The districts which may be carved out of a township under the provisions of the act may be regarded as standing in the same relation to the town as sewer districts in cities stand in relation to the city. They are established mainly for the purpose of imposing the expense of local improvements upon the persons and property more immediately benefited by the improvements. The fact that the persons authorized to make the contracts therefor and to annually apportion, upon the taxable property within the district, the amount to be raised to defray the expense, does not confer upon them powers of local government. The people of the district are the only ones interested in those matters and the powers conferred are limited to such particulars. Authority to execute a contract is not governmental in its nature; and the duty of making apportionments, under the statute, is clerical in its character. The assessment of the property, the imposition of the tax and its collection are still

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performed by the town officers. The general scheme of the act seems in all respects to be in harmony with similar provisions in the charters of numerous cities in respect to local improvements, and those provisions have never been regarded as constituting municipal corporations of such districts.

As these water districts remain integral parts of the town, the provision of the organic law prohibiting the Legislature from authorizing a town to incur indebtedness for any except town purposes does not apply. (Const., art. VIII, § 10.) A town may incur indebtedness for any local improvement that may be for the general welfare, although the direct benefits therefrom accrue more particularly to the residents of a designated district within the town. Neither is it a diversion of the money or property of the town for it to become primarily liable for the expense of such a local improvement, although payment of the expense is ultimately to be made by the residents of a particular district within the town. There is nothing in the statute that limits the use of the water to the inhabitants of the designated district, nor any provision which gives them any prerogative thereto. Therefore, the rule adopted in respect to the improvement and lighting of public highways must be regarded as having application. Sun Pub. Assn. v. Mayor, 152 N. Y. 257; Palmer v. Larchmont Electric Co., 158 id. 231.

Neither is that provision of the act which confers upon the town board the authority to appoint commissioners and authorizes such commissioners to execute the contract, violative of the organic law. Astor v. Mayor, 62 N. Y. 567; People ex rel. Commissioners v. Supervisors, 170 id. 105. I think, therefore, that contracts made by such commissioners under and in pursuance of the provisions of the act, are binding upon the town, as being in the accomplishment of town purposes.

The contention that the contract is not binding upon the defendant because it is made in the name of the commissioners is without support. It is true the contract does not in terms purport to bind the town and does not refer to the act under which the water district was established and the commissioners appointed. But the complaint sets forth the facts in relation to the establishment of the district and the appointment of the commissioners, and the making of the contract in pursuance of the provisions of the act. This I regard as sufficient to support the

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contract as one made by the town, the commissioners having authority to bind the town by a contract for the purposes intended. Fleming v. Village of Suspension Bridge, 92 N. Y. 368.

The further objection that the contract is void for providing for the construction of sewers as well as water mains must, I think, also be overruled. The act authorizes the establishment of a water system but does not specify the particulars that shall constitute such a system. That question is left to the judgment of the people as evidenced by their petition asking for the establishment of the district and the appointment of the commissioners. Furthermore, I think the court should take judicial notice that in the establishment of a water system, the laying of pipes for the discharge of the water, as well as for its delivery, is a feature incidental to the system.

Demurrer overruled, with leave to answer on payment of costs.

ANNIE M. SADLIER, et al., Plaintiffs, *v.* THE CITY OF NEW YORK, Defendant.

(Supreme Court, Kings Special Term for Trials, February, 1903.)

Nuisance and trespass — Legislative authorization cannot cut off damages — English rule distinguished.

The rule in England that no damages or redress can be obtained in the courts for a nuisance, or for any structure or use of real property, which does direct injury to private property, provided parliament has authorized the same and has not provided compensation for such injuries, does not and cannot exist in this country.

The English rule is founded on the unrestrained and unlimited power of parliament to take or damage private property at will without compensation, whereas, in this country, our legislatures are under constitutional restraints in respect of individual rights of property.

The restraints of Magna Charta in favor of individual rights are upon the crown only; they never were and are not upon parliament.

The distinction in respect of "direct" and "consequential" injuries pointed out, the latter being *damnum absque injuria* under the general rule of damages.

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The owner of a Brooklyn building, situate between the East river and the entrance to the New York and Brooklyn bridge, lower than it by eighty feet and distant from it southerly twenty feet, upon the roof of which dirty water and slush, containing solid matter, fall or are blown from the bridge, flooding the roof by clogging the leaders from it and hitting against the northerly side of the building and its windows, is entitled to compensation from the city of New York, the owner of the bridge, as for a direct injury to private property and the facts that the location and use of the bridge have been authorized by the legislature and that it has made no provision for compensation for such injuries are not material.

SUIT to restrain a nuisance, or continuing trespass, which injures the plaintiffs' real property, and for damages.

The New York and Brooklyn Bridge is suspended on the Brooklyn side of the East River about 80 feet above the roof of the plaintiffs' building, which is about 20 feet away from the said bridge, i. e., from a line dropped from the southerly side thereof. Dirty water and slush accumulate on the wagon roadway of the said bridge on the southerly side thereof, and run off in considerable quantities and volume, and owing to the action of the wind upon it as it falls, it is cast upon the roof of the plaintiffs' building, and also against the side of the said building, and the windows thereof. Such slush consists of water from rain and melting snow, mixed with horse manure, dirt and splinters and fibres torn and worn from the said roadway, which is of planks, by horses' feet and wheels of vehicles. The said slush is cast against and upon the plaintiffs' building, and settling upon the roof clogs the waste pipes and overflows the said roof and injures it and leaks through it.

Jesse W. Johnson and Albert E. Lamb for plaintiffs.

R. P. Chittenden for defendant.

GAYNOR, J.: The learned counsel for the defendant meets the case with the contention that the things complained of are necessarily and unavoidably incident to the existence and use of the bridge; and that, therefore, as the legislature located and authorized the construction and use of the bridge, just where it is and as it is, the plaintiffs are remediless; that the injury done to their property has to be deemed *damnum absque injuria.*

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In brief, it is claimed that the law of this state is that individuals can have no redress in the courts for injury done to their property by a nuisance authorized by the legislature, or by reason of the construction or use of any public work so authorized, unless the legislature also provide that compensation be made for such injury. A considerable array of *dicta* from opinions in the courts of this state is presented for this proposition; but nevertheless there is no such rule in this state nor anywhere in this country, and, more than that, it is impossible that there should be, it seems to me, under our constitutional restraints on legislative power in respect of the property rights of individuals.

Whatever of misunderstanding there may be on this head in this country arose from the inadvertent citation of certain English decisions which can have no application whatever with us. It suffices to refer to the London pesthouse case (Hill v. Managers of Metropolitan Asylum District, 6 App. Cases, 193) as typical of the class of decisions referred to, for it is invariably cited in support of the *dicta* which have been mentioned. Although such *dicta* are found in abundance, no actual decision has ever been based in this state upon the English rule they mention, as will appear from a close reading of the cases from *Cogswell* v. *N. Y., N. H. & H. R. R. Co.* (103 N. Y. 10) to *Fries* v. *N. Y. & H. R. R. Co.* (169 N. Y. 270).

The law in England undoubtedly is that if parliament authorize the actual taking of private property, or the construction and use by an individual or corporation of anything which is necessarily a private nuisance, or injures the property of individuals, and provides no compensation therefor, the courts can give no redress for the injury. The question in each case is whether that is the intention of parliament, and if it be the courts are bound to abide by it. But while parliament has the power to do this, the courts of England refuse to construe an act of parliament as doing or meaning so unjust a thing unless the act be so specific and precise that it cannot be otherwise construed (Hill v. Managers, *supra*).

But this is so in England only because parliament is under no limitation or restraint. All lawyers and other students of constitutional history know that parliament is not subject to the constitutional restraints in respect of private rights which legislative bodies in this country are under. It is omnipotent, as the expression is (Bryce's Am. Com. Vol. 1, p. 32; Lecky's Dem. &

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Lib. Vol. 1, pp. 8, 53). The restraints upon government contained in Magna Charta were extorted from the crown, and were and are to this day in England upon the crown or executive branch of government only. They were never restraints upon legislative power until made such in this country by our fundamental instruments of government. Those who made them such may not have been aware at the time that they were doing so, only having in mind, it may be, the sense in which such restraints had been theretofore understood; at all events they were evidently unaware of their far reaching effects as exemplified by modern constitutional development.

"The concessions of Magna Charta were wrung from the King as guarantees against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeiture of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; * * * the omnipotence of Parliament over the common law was absolute, even against common right and reason. * * * In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations on all the powers of government, legislative as well as executive and judicial. * * * Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation" (Hurtado v. California, 110 U. S. p. 531).

In this country, the more plain and explicit the legislature might be in authorizing the taking of private property, or a "direct" injury thereto, by a nuisance *per se,* or any trespass, and without compensation, the more plain it would make manifest that it had exceeded its constitutional powers (Kobbe v. Village of New Brighton, 20 Misc. Rep. 477.) The full extent of legislative power to legalize and shield a nuisance is to exempt it from public prosecution (Bohan v. Port Jervis G. L. Co., 122 N. Y. 18).

Enough has been said to show the absolute incongruity of citing in this country as applicable to our system and to the limited

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power of our legislatures the English rule which has been mentioned. And it is moreover wholly meaningless to disconnect it from the question of "direct" injury, and cite it (as is sometimes done) in support of the proposition that for "consequential" injury done by such structures and uses authorized by the legislature, no recovery or redress can be had. Non-liability for consequential injuries is the ordinary general rule of damages which is laid down and applied daily in the trial of causes. It is applicable generally, and not merely to the cases of structures and uses authorized by the legislature. It is to be found in text books on damages and in many decisions. All injuries are either direct or consequential, and the general rule is that these latter are not actionable, but *damnum absque injuria* (Lansing v. Smith, 8 Cow. 146; Sedgw. on Damages, §§ 110, 122; Suth. on Damages, §§ 14, 15). Judge Cooley states the rule with careful accuracy as follows: "It is a general rule that no one has a vested right to be protected against consequential injuries, arising from a proper use of rights by others. This rule is peculiarly applicable to injuries resulting from the exercise of public powers" (Const. Lim. 6th ed. p. 473).

The English rule of immunity from liability for injuries authorized by parliament is based on the power of parliament to take or directly injure private property without compensation, and relates only to "direct" injuries authorized by parliament, i. e., injuries for which damages could be recovered under the general rule of damages but for the act of parliament. It is of course never cited in England in cases of consequential injuries, for in such cases there as here the general rule of non-liability for consequential injuries applies; it is only cited in cases of direct injuries. The general rule of damages prevents a recovery for consequential injuries in all cases, and it is entirely unnecessary to cite or plead any act of parliament or legislature to escape liability therefor. To cite the said special English rule in this country in a case of consequential injuries is of course the same barren misapplication of it that a citation of it in a like case in England would be; and to cite it in this country to shield a person from liability for direct injuries done by him to the property of another under authority of the legislature, as may be done in England, would be wholly futile, for legislatures in this country have not the power to authorize direct injury to private property

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and deprive the persons so injured of a right of action therefor, or the taking of private property without just compensation therefor.

Our constitutional provisions against depriving any person of his property (1) without due process of law and (2) just compensation may be violated without the physical taking of property. They extend to every act, whether legislative or executive, which directly affects individual property or rights of property injuriously (Matter of Jacobs, 98 N. Y. 98; People v. Marx, 99 N. Y. 377; Forster v. Scott, 136 N. Y. 577; Garvey v. Long Island R. R. Co. 159 N. Y. 323; Huffmire v. City of Brooklyn, 162 N. Y. 584; Pumpelly v. Green Bay Company, 13 Wall. 166; Eaton v. Boston, C. & M. R. Co. 51 N. H. 504). And an act of the legislature depriving a person in advance, as is claimed to be the case here, or subsequently, of a right of action for a trespass or direct injury to his property is void for being in violation of the guaranty of due process of law (Dyett v. Hyman, 129 N. Y. 351; Levy v. Dunn, 160 N. Y. 504).

In every case like the present, therefore, the question is whether the injuries complained of are direct, or only consequential, the latter kind not being a basis for a cause of action under the general rule of damages, while the former is, as we have seen.

And in considering the question it is necessary to keep in mind carefully (as has been done in the foregoing) that the phrases "direct injury", and "consequential injury", are not the same or of the same meaning as the phrases "direct damages", and "consequential damages". The latter phrases are of the terminology of damages and the measure of damages, while the former are not, but are of the terminology of injuries. To illustrate, a direct injury may, in addition to direct "damages", do indirect, or, as it is often more loosely phrased, consequential, "damages", and the latter are recoverable as well as the former unless they be not proximate but remote, to use two other words which belong to the terminology of damages. In the case of a direct injury, the measure of damages includes both direct and indirect (or consequential) damages; but in the case of a consequential injury, there are no recoverable damages at all. Consequential (i. e., indirect) damages can only result from a direct injury; while no actionable damages of any kind or degree result from a consequential injury. Enough has been said to show the confusion

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which arises from the use of the words injuries and damages interchangeably. The phrases "remote and consequential", and "remote or consequential", in respect of injuries, are sometimes used, but are obviously tautological and lacking in scientific accuracy. It is enough to say injuries are consequential, for then they are non-actionable. In a loose sense they are remote, but that word belongs to such damages from a direct injury as are too remote to be allowed in a recovery (Sedgw. on Damages, § 122; Cooley's Const. Lim., 6th ed. p. 473; Lansing v. Smith, 8 Cow. 146).

In the present case the injuries are direct, there being an actual physical invasion of the plaintiffs' property. In the too often cited case of *Radcliff* v. *Mayor* (4 N. Y. 195), there was no such invasion, and the injuries were plainly not direct, unless the court could hold that the rule of lateral support — which, as the opinion of the learned judge there writing shows, only hangs by a thread, at best, and is more fanciful than real, applying only to the ground in its natural state, and not to any artificial weight thereon — applied to the land in a highway, which never was the case. The injuries there were only an incidental consequence of the city doing what it had the right to do on its own land; and the opinion points out that a private owner may open and work a mine, though it tumble down his neighbor's house; pull down his own house or wall, though the adjoining house fall for lack of its support; dig on his own land, though his neighbor's house fall into the pit; and so on; the injuries in all such cases being not direct, but only consequential, i e., an incidental consequence of his lawful act, and therefore *damnum absque injuria*. How that case ever came to be cited in opinions as if authority for the proposition advanced by the defendant in the present case, i. e., for the proposition of non-liability for direct injuries, is one of the singular things of judicial literature. It is not to be wondered at that such opinions have been referred to by the highest authority as having "gone to the uttermost limit of sound judicial construction, * * * and in some cases beyond it" (Pumpelly v. Green Bay Co. 13 Wall. p. 181).

And this *Radcliff* case may be used to point out the distinction between direct and consequential injury. The injury caused to abutting land by cutting down the grade of the land of the street, and thus making it necessary for the private owner to protect his land by a wall, or else level it to the street grade, was conse-

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quential, and therefore *damnum absque injuria;* whereas, if the city in grading the street had, for instance, diverted the natural flow of water, or accumulated the surface water, and cast it upon the abutting land, that would have been a direct injury for which the city would have been liable in damages, even though it was unavoidable. And the present case serves for similar illustration; for while the casting of slush upon the plaintiffs' house is a direct trespass and injury, the great depreciation of the value of the land situated as the plaintiffs' is in the space between the line of the entrance to this bridge and the river, by the diversion to the bridge of the former travel to the ferries, is consequential. The former damage is recoverable, because it results from a direct injury; the latter not, because it results from a consequential injury.

The two cases of *Gibson* v. *United States* (166 U. S. 269) and *Pumpelly* v. *Green Bay Co.* (13 Wall. 166) also serve as clear illustration when contrasted. In the former, certain improvements by the government out in the channel of the Ohio river for the benefit of navigation, which were done under legislative authority, caused the water in the river to recede to a considerable extent from the plaintiff's dock on the shore. The injury was held to be consequential, and therefore not actionable. In the *Pumpelly* case, on the contrary, water was backed up and made to overflow the plaintiff's land by reason of a similar improvement done under legislative authority, and the injury was held to be a direct one and therefore actionable. In the one case there was no trespass or direct injury, while in the other there was.

The legislative authority was not a shield in either case. In the *Gibson* case there were no direct injuries, but only consequential injuries, and therefore no damages to be shielded from by legislative authority, the every day general rule of damages allowing no damages in such cases; in the *Pumpelly* case there were direct injuries, and it was held that legislative authority could not shield from liability for the damages caused thereby. Legislative right to do a thing is no more of a shield than common law right. If you have the right to do a thing, you are still liable in damages for any direct affirmative trespass or injury you commit in or by doing it. That such direct injury may be unavoidable does not alter the case at all; the question of negligence does not enter into it; liability for negligence is another thing altogether (Hay v. Cohoes Co. 2 N. Y. 159; St. Peter v. Denison, 58 N. Y. 416; Sullivan v. Dunham, 161 N. Y. 290).

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The recent case of *Fries* v. *N. Y. & H. R. R. Co.* (169 N. Y. 270) has been strongly urged upon me by the learned counsel for the defendant, but I cannot perceive that anything was actually decided there contrary to the foregoing. The language of the first of the prevailing opinions is large, and may seem to be that there is no liability for direct injuries, or to pay for easements diminished, and to that extent taken, for the reason that the defendant took its railroad out of the cut below the surface of the street, and put it upon the elevated structure in the street, which was complained of as diminishing the plaintiff's easements in the street of light and air, by authority and direction of the legislature. But this could scarcely have been meant, for the same principle if sound would have applied if the legislative direction had been to take the road off the street and put it through the middle of the blocks, in which case, however, every one would perceive the contrary, i. e., the legislative intention to be that the defendant should resort to its right to exercise the eminent domain power to acquire the necessary property for the purpose, and also pay damages for all direct injuries it should do. The opinion as a whole is not open to the construction contended for by the learned counsel for the defendant. Moreover, the other prevailing opinion rests on the express assertion that the injuries complained of were "remote or consequential" (to quote the phrase used), and therefore not actionable; and the judgment of the court seems to be based on that theory. True, it has been held through a long line of cases, beginning with that of *Story* (90 N. Y. 122), that such an elevated structure in a street does directly injure and diminish the abutting owner's easements of light and air in the street, and that such injury is not consequential merely; but it must be that in the *Fries* case the Court of Appeals meant to and did find the fact the other way.

Let findings be presented; the amount of past damages are fixed at $1,200; the amount of permanent damages, if an alternative judgment is insisted on, will be fixed then.

Judgment for the plaintiffs.

GAYNOR, J.: Since the foregoing was filed the Court of Appeals has decided the case of *Muhlker* v. *N. Y. & H. R. R. Co.*, 173 N. Y. 549, which is one of a class with the *Fries* case (supra). It

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does not seem that anything was actually decided there which requires a change of the decision made in this case, as is contended. It must, it seems to me, be understood that this later judgment of the Court of Appeals proceeds on the same ground as that in the *Fries* case, viz., that the injuries were not direct but only consequential, and therefore *damnum absque injuria,* as is the general rule of law. A contrary opinion must be deduced, it is contended, from a clause of the prevailing opinion, viz.:

"But that it (the legislature) possessed the power to improve the street, as it did, for the benefit of the public, in the manner it did, compelling abutting owners to bear so much of the burden of the improvement as resulted from the *partial destruction* of their easements of air, light and access, we have no doubt."

As it has been uniformly held since the *Story* case that such "partial destruction" of easements by an elevated railroad is a "taking" of property within the meaning of the constitution, the words of the opinion quoted would mean, if not restricted in meaning to consequential injuries, that although a railroad corporation cannot take such easements, in whole or in part, except by eminent domain proceedings and upon making compensation therefor, the legislature may pass an act the effect of which is, *ipso jure,* to take such easements without compensation, and at the same time make a gift of them to a railroad corporation. It seems to me, to borrow a phrase from Judge Bronson, that "no one can wink so hard as not to see" that this cannot be done in the face of the prohibitions in both the State and Federal Constitutions against a state taking or depriving any one of property without compensation or due process of law. If it can, then all property which a railroad company needs to acquire by eminent domain proceedings may be acquired in this way instead. This seems to show that the able judge who wrote referred to "partial destruction" by consequential injuries, and not by direct injuries amounting to a taking or depriving within constitutional meaning. Moreover (and of course this has to be said with hesitation and subject to correction), our state constitution does not seem to allow the taking of property for a railroad or other business corporation, or for a municipal or local, as distinguished from a state, improvement or use, unless the compensation therefor be ascertained by a jury or by commissioners appointed by a court

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of record (Art. 1, § 7). The state is not pledged for payment in such cases by the mere fact of taking, but only in cases of the taking of property by the state for state improvements or uses (Sage v. City of Brooklyn, 89 N. Y. 189); and it is only in these latter cases that the compensation is not required by the section of the state constitution which has been cited to be ascertained by a jury or by commissioners (Matter of Rogers Avenue, 29 Abb. N. C. p. 364). Can the legislature by any means or method avoid this process in the former cases? If so, no cases are necessarily restricted to juries or commissioners, although the constitution has been understood to the contrary. It seems obvious that the said opinion refers to consequential injuries only, and not to injuries which in effect take or deprive individuals of property, or of the full or unimpaired use thereof, which is a taking or depriving of property.

PERRY DICKIE, Plaintiff, *v.* HELEN D. ADAMS and DAVID I. REYNOLDS as Administrators, Etc., of SERENA D. TURELL, Deceased, Defendants.

(Supreme Court, Kings Trial Term, February, 1903.)

Trust in personalty — Savings bank deposit — Proof of trust — Intention to create.

Proof, by a transcript thereof, that a woman, who died in 1898, had, in 1880, a savings bank account which ran "in trust" for the plaintiff, and that, in 1882, the deposit was drawn out by a check, signed by her as an individual, referring to the savings bank-book by its number and payable to a third person, does not show that she created a trust for the plaintiff in the deposit, which sum is not a part of her estate, where there is no evidence that she herself made the deposit, or ever declared an intention to create such a trust, or ever had the savings bank-book, and where all the evidence in the matter comes from an official of the bank who did not become such until many years after the deposit and its withdrawal.

ACTION to recover a sum of money.

John H. Parsons, for plaintiff.

Louis B. Adams, for defendants.

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FORBES, J. This is an action brought against the representatives of Serena D. Turell, deceased, to recover the sum of $1,537.02, and interest from the 2d day of October, 1882. This fund represents two deposits, amounting to $1,400, and the interest thereon $137.02, alleged to have been withdrawn by the deceased from the Irving Savings Institution, located at 96 Warren street, New York. The action is based upon the theory that the defendants' intestate in making said deposits created a trust in favor of the plaintiff. On the trial a jury was waived, and the action was tried before the court.

The evidence shows that an account was opened in said bank on the 8th day of January, 1880, by the deposit of $1,000. The second deposit was made on the 1st day of July, 1880, of $400; the balance of the account represents accrued interest. It is undisputed that the account was opened in the name of Serena D. Turell, in trust for Perry Dickie, and that the account was closed by the personal check of Serena D. Turell, dated July 2, 1882. The check was made payable to the order of Jas. E. Carpenter, or bearer, and states that it is for the balance of money due on book 32,371. The check is signed by the defendants' intestate individually.

On the trial the plaintiff's attorney called the present secretary of said institution — the witness Lattimer — whose connection with that institution commenced in 1893. His evidence shows that all he knows about the transaction itself is that the books of the bank show the account from which he produced a transcript, which was offered and received in evidence without objection. He also produced on the trial pass-book No. 32,371, which was offered for identification, and was subsequently sought to be introduced in evidence, but was excluded by the court under the plaintiff's exception. There is no evidence that the defendants' intestate herself deposited said fund, or that she ever received or was in possession of the pass-book; and the case is barren of evidence tending to show that she intended to, or in fact ever did, create the trust suggested by the complaint.

It is held in Farleigh v. Cadman, 159 N. Y. 169, that "A gift, whether in the form of a trust, or otherwise, always involves the intention of the donor."

I do not think there is anything in the present case which warrants this court in holding that the evidence introduced on the

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part of the plaintiff is sufficient to create an inference that a trust was ever intended by the defendants' intestate. The evidence shows that she, at times, had several different accounts in the bank in different forms. The evidence of the witness Lattimer shows that the persons in control of said institution, the clerks and bookkeepers thereof at that time, are either dead or that the residences of those living are unknown to him, and that none of them have any present connection with the bank.

It is claimed by the plaintiff's attorney that the receipt of the transcript of the account furnished, and the subsequent drawing of the check by the decedent, are sufficient evidence that the deposits were made by the defendants' intestate, and that the trust was created by her. The transcript of the account and the account itself are simply the declarations of the bank or its bookkeeper. There is no explanation of how the deposits were made, by whom they were made, nor is there any evidence that the deceased ever had in her possession the pass-book, marked for identification, or ever saw the account.

To establish a trust in favor of a living person as against the deceased, the evidence should be clear and convincing, disclosing the intention to create a trust, or such circumstances should be pointed out as would clearly show the intention to create the trust. Beaver v. Beaver, 117 N. Y. 421; Robinson v. Carpenter, 77 App. Div. 520.

Nor do I think it can be inferred from the check introduced in evidence that such trust was created, or that the funds sought to be recovered ever passed into the possession of the deceased or formed any part of her estate. The check is made payable to Jas. E. Carpenter, and the body of the check is evidently written in some hand other than that of the deceased and is indorsed "Jas. E. Carpenter," apparently in the handwriting of the person who drew the body of the check.

The only identification, and therefore the only evidence in the case that the check was drawn against this account is a reference therein to the number of the pass-book and that the account was closed on the 2d day of October, 1882. The check bears date July 2, 1882. The deceased was a widow, living at the Park Avenue Hotel, in the city of New York, at the time of her death, and had been residing there for many years prior thereto. There is no evidence which identifies Carpenter, the indorser of the check. Pre-

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sumptively the fund went into his hands. There is no evidence that he turned it over to the deceased.

If there is any declaration made by the deceased which serves any purpose, her signature to the check is a repudiation of the idea that she ever created a trust or knew that one had been created; but, on the contrary, it remains a declaration that she did not so regard it; that it was never her intention to create a trust in favor of the plaintiff, and that the bank officers so understood that fact and accepted her personal check.

I am aware that it has been held by the learned Appellate Division that "When money is deposited in the name of the depositor in trust for another, even though the latter is not notified of such deposit and the depositor keeps the pass book, the deposit creates an irrevocable trust in favor of the beneficiary, which trust cannot be defeated by the depositor afterward withdrawing the money." Jenkins v. Baker, N. Y. L. J., Dec. 16, 1902; S. C., 77 App. Div. 509.

The facts in this case do not warrant the conclusion reached in that case, nor does the plaintiff bring the present action within that case. The burden of proof is upon the plaintiff, *first,* to show clearly the deposit and the creation of the trust by the declaration of the depositor,— not of the bank officers; *second,* that the fund so withdrawn by the depositor forms a part of the assets and went into and forms a part of her estate.

The evidence is clearly insufficient to show these facts, and while certain inferences, perhaps, may be properly drawn, those inferences in this case do not amount to evidence of the necessary facts to permit the plaintiff to recover. Cunningham v. Davenport, 147 N. Y. 43, approved in Matter of Biggars, 39 Misc. Rep. 426.

The evidence discloses that the alleged trust was not communicated to the plaintiff, and that he knew nothing about the deposit until about the month of March, 1902 — nearly twenty years after the money had been withdrawn. The defendants' intestate died on the 21st day of May, 1898. I do not think it is necessary to examine the defense of the Statute of Limitations.

The complaint must, therefore, be dismissed, with costs.

Complaint dismissed, with costs.

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VIRGIL K. KELLOGG, Plaintiff, *v.* GEORGE A. STODDARD and REA STODDARD, as Executors, Etc., of ADDISON STODDARD, Deceased, Defendants.

(Supreme Court, Jefferson Special Term, February, 1903.)

Attorney — Counsel fee awarded him in a wife's action for a separation collectible of the decedent husband's estate — Necessaries.

An attorney, who was retained by the wife in an action which she brought for a separation from her husband, who procured therein an order allowing him a reasonable counsel fee on account of his services to her, but who took no steps to collect it during the husband's lifetime, may, after his death, where his executors have rejected the claim, maintain thereon an action against them as such and this because the claim is to be deemed a debt to the attorney contracted by the husband in his lifetime.

Such an action may also be maintained upon the ground that the services of the attorney were a "necessary" to the wife for which she might lawfully pledge her husband's credit.

DEMURRER to complaint.

Virgil K. Kellogg, plaintiff in person.

Wilbur A. Porter, for defendants.

ROGERS, J. The complaint alleges that the plaintiff is an attorney-at-law; that in the month of July, 1900, Harriet Stoddard, the then wife of defendants' testator, Addison Stoddard, retained him to commence an action in the Supreme Court for a separation and to procure a judgment for a suitable and adequate provision for her maintenance and support; that he thereafter, from time to time, spent a large amount of time and disbursed large sums of money in the preparation for and in the carrying on of said litigation, and that the separation action was begun on the 25th of January, 1901. The said Addison, through his attorney, interposed an answer which on the 13th of February thereafter was served on the plaintiff as the attorney for said Harriet.

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On the 6th of April, 1901, an order was duly made in said action at Special Term, directing the defendant therein to pay to this plaintiff the sum of $250, as and for a counsel fee on account of services. It is also alleged that the amount of plaintiff's disbursements and the value of his services therein "*exceeded the amount of counsel fee* (*so*) *allowed to him.*" Said order was entered in the office of the clerk of Lewis county April 9, 1901; a copy was served on the defendant's attorney April 12, 1901, and a certified copy thereof was served on the said Addison, personally May tenth. No part of said $250 has been paid.

On the 25th of May, 1901, the said Addison died, leaving a last will and testament, which was duly admitted to probate by the surrogate of Lewis county September sixteenth of the same year, and in which the defendants were named as executors; they duly qualified and letters testamentary were issued to them.

On the 12th of December, 1901, the plaintiff served on the defendants a duly verified claim for the amount directed to be paid by said order; this was rejected on the twentieth day of said month, whereupon plaintiff offered to refer the same to some suitable person, to be selected according to law, which offer was refused.

The complaint demands judgment for $250 damages, with interest from April 6, 1902, besides costs.

The summons is dated and the complaint verified June 18, 1902. The defendants' appearance is dated July 7, 1902. It may, therefore, be assumed the action was commenced prior to that time.

The defendants demur "*upon the ground and for the reason that said complaint does not state facts sufficient to constitute a cause of action.*" No other ground of demurrer is specified; hence this is the only objection that can be considered. Code, § 490; Fulton Fire Ins. Co. v. Baldwin, 37 N. Y. 648.

In my opinion the action is maintainable on either of two grounds:

(1.) The order of April 6, 1901, was an adjudication that Mr. Stoddard pay to the plaintiff $250. To make this payment, without further action on the part of the plaintiff, became and was his duty. Having neglected to do what the order required, the plaintiff, after the lapse of ten days from service of a copy of the order, might have issued an execution against Mr. Stoddard's personal property (Code, § 779), or procured an order seques-

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trating his personal property and the rents and profits of his real estate (Code, § 1772), and in case of failure to so collect, might have instituted proceedings to punish him for contempt, because of disobedience of the order. Code, § 1773. The death of Mr. Stoddard, without any of these steps having been taken, embarrasses all, and makes impossible the employment of at least two of these statutory remedies. But the neglect of the plaintiff to take one or more of them in no wise forfeited his rights under nor excused compliance with the order by Mr. Stoddard.

I do not see why his obligation should not be made good by his personal representatives. By it the plaintiff and Mr. Stoddard became and thereupon bore to each other the relation of debtor and creditor. McQuien v. McQuien, 61 How. Pr. 280–283. His death ended the action, but did not deprive parties of rights incidental thereto, which, in his lifetime, had become vested; nor did it relieve his estate from the obligation to pay that for which he had become bound.

Accordingly it has been held that a judgment requiring a husband to pay alimony to the wife during her lifetime is proper, notwithstanding he might die first. Burr v. Burr, 10 Paige, 20; affd. 7 Hill, 208; Galusha v. Galusha, 43 Hun, 181.

The estate of the husband is liable to pay alimony accrued and in arrears at the time of his death. 2 Bish. Mar., Div. & Sep., § 1000.

The attorneys for a deceased wife may enforce payment of costs against the husband, which had been awarded to them prior to the wife's death. Lachenmeyer v. Lachenmeyer, 65 How. Pr. 422. If, then, it is the right of the plaintiff to have and the duty of the defendants to pay the sum awarded, it would seem that the law must afford some remedy to the party entitled to be paid. Where payment of motion costs could not be enforced by attachment, because the party directed to pay had gone without the jurisdiction of the court, an action of debt for their recovery was maintained. McDougall v. Richardson, 3 Hill, 558.

I do not see why an action is not the proper remedy here. It was suggested on the argument that the provisions of the Code (§ 1913), prohibiting the bringing of an action, on a judgment rendered in a court of record of the State, between the original parties to the judgment, prevent the maintenance of this action. To this there seems to be an answer in the fact that the parties

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are *not* the "*original parties*" in the judgment — Mr. Stoddard having died and this action being against his personal representatives. Smith v. Britton, 2 T. & C. 498. Besides, this action is to recover the amount awarded by an interlocutory *order* and not a *judgment*. Nor is the fact that the order directed payment to the attorney instead of the party a valid objection. The court, for the due prosecution of the action, might direct the money to be applied to any necessary purpose and in any proper manner. Schloemer v. Schloemer, 49 N. Y. 82.

It seems to me, therefore, that by reason of the embarrassments that would come in case of an attempted enforcement of the order, pursuant to the provisions of the Code, the maintenance of this action is justified.

(2.) I think the action may also be maintained upon the ground that the services rendered by the plaintiff to the wife were *necessary*, to pay for which she could pledge her husband's credit.

The demurrer admits all the facts stated in the complaint, as well as such as may be implied by fair and reasonable intendment. Pettibone v. Moore, 75 Hun, 461.

The action of Mrs. Stoddard was brought against her husband to procure a separation from him, and "*to compel him to make suitable and adequate provision for her maintenance and support.*" The plaintiff, as her attorney, rendered services and expended money in the preparation for and prosecution of the action, amounting in value to more than $250; and it had such merit as to constrain the court to award that sum to him. It must, therefore, be assumed that the action was brought *bona fide*, and upon probable cause.

In an action for absolute divorce the parties and their attorneys are confined to such remedies as are given them by statute (Walker v. Walker, 155 N. Y. 77); but in an action for a separation because of cruel and inhuman treatment of the wife by the husband, she has an implied authority to employ counsel at his expense to prosecute the suit. Langbein v. Schneider, 27 Abb. N. C. 228; Naumer v. Gray, 28 App. Div. 529; S. C. (after new trial), 41 id. 361.

Within the cases cited the plaintiff might have maintained an action for services — assuming the facts warranted the bringing of the separation suit — regardless of the order directing payment. That order, however, fixes the amount he is entitled

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to receive. Moreover, the complaint alleges that the moneys expended and services rendered were of a value exceeding that sum. This the demurrer admits.

The demurrer is overruled, with leave to the defendants to answer within twenty days, on payment of costs.

Demurrer overruled, with leave to defendants to answer within twenty days, on payment of costs.

JOHN L. PITTS et al., Plaintiffs, *v.* FRED DAVEY, Defendant.

(Supreme Court, Montgomery Trial Term, February, 1903.)

Entire contract for a sale by installments — Rights of parties after the vendees have prevented performance.

Where vendees, after having contracted with a middleman for the delivery of 5,000 barrels of cement, made by only one company, in weekly installments covering about four and one-half months, notify him about the time of the first delivery not to deliver any more until further notice, they have prevented performance and made the first default where it appears that he would have been able to fulfill if they had not interfered.

Where, at their request, the middleman subsequently resumes deliveries, but ultimately becomes unable to complete because, through no fault of his own, he could not get the cement of the company, the vendees cannot recover of the middleman the extra cost of the cement which they had to buy and he could not furnish, while he may recover of them the value at the contract price of the deliveries he made them after their default.

ACTION upon a contract.

Henry V. Borst, for plaintiffs.

White & Ferguson, for defendant.

KELLOGG, J. M., J. A fair interpretation of the contract is that the defendant was to sell and deliver to the plaintiffs 5,000

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barrels, more or less, of Ironclad cement, which the plaintiffs might require to fill their contracts with the railroad company at Amsterdam, Degraff and Hoffmans. The deliveries were to be 500 barrels January 1, 1902, 300 barrels January fifteenth, and 250 barrels per week thereafter at either of said places, as the plaintiffs from time to time might designate, the cement to be subject to the inspection of the railroad company's inspector. At the time of the contracts the plaintiffs knew that the defendant had not the cement; that this brand of cement was made only by the Glens Falls company, and that the defendant acting as a middleman was obtaining it from that company by a contract then being made with the said company to fill this contract. The statement in the contract that the defendant is to "insure" the delivery has reference to his character as middleman. December thirtieth plaintiffs wrote the defendant not to ship any cement until further notice, except the 500 barrels due January first. The 500 barrels were then in course of shipment, and this letter remained unanswered. March eleventh the plaintiffs requested the delivery of 500 barrels at Hoffmans that month and 500 barrels in April. March thirty-first they wrote defendant not to ship the cement ordered for April until further notice. From time to time the defendant shipped to the plaintiffs all the cement ordered, concededly until June first, and, in fact, until June twentieth. The plaintiffs notified the defendant the inspector would not accept the two carloads shipped May thirty-first. They were, nevertheless, used, but tests were thereafter made June seventh and fourteenth by the company as to their quality. Three carloads shipped June thirteenth, sixteenth, and seventeenth, the plaintiffs notified the defendant the inspector would not accept as a compliance with the specifications, and in the latter part of July these cars were actually accepted and used by the plaintiffs as complying with the specifications. The defendant had not failed in delivering cement as ordered until he was notified the inspector would not accept these three cars, and then the Glens Falls company refused to ship any more cement to the plaintiffs until the tests were made and it was determined whether the cement was satisfactory or not, claiming that it was so pressed with orders at the mill that it could not have the cement held up. From that time until after these three cars were accepted,

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about August fourth, the defendant was not able to obtain from the mills the cement required by the plaintiffs.

Plaintiffs having notified the defendant and he in turn the mill that five carloads of cement were not accepted, it was not unreasonable for the Glens Falls company to refuse to send other cement until it was determined whether their cement would pass this inspector or not. The cement was in fact according to the contract and specifications, but as the Glens Falls company was the only company making this particular cement, and it was the only cement of that kind, if it was not to be accepted there was no use of sending on other installments. The contract being made with reference to this cement, the provisions therein for inspection excused the plaintiffs from taking the cement unless it passed inspection, and if it did not pass inspection and was the regular product of that mill, it probably excused the defendant. The failure to pass inspection was a contingency which both parties had in mind as possible, and if it failed there was probably no further liability of either party upon the contract for cement not already delivered. Dolan v. Rodgers, 149 N. Y. 489.

After these three cars were accepted the mills furnished in August about 750 barrels to the plaintiffs, but in September it is conceded that with the use of his best efforts the defendant was unable to obtain the cement from the mills. In fact at that time the market was so congested that it was not possible to fill the orders of the plaintiffs as made, and there was a general scarcity of cement in the market, and the mills were behindhand in their orders. At the time the contract was made the Glens Falls company had sufficient cement and had arranged to comply with the terms of plaintiffs' contract, and the cement would have been delivered at the times and in the manner provided for by the contract if the plaintiffs had not stopped the shipments. Had the contract been performed according to its terms the 5,000 barrels of cement would have been delivered by May fourteenth, and the 5,562½ barrels actually required to fill the plaintiffs' contract with the railroad company by May twenty-eighth. The defendant furnished in all 3,587½ barrels. There is a balance due the defendant of $1,303.59 for cement actually delivered and not paid for, which he seeks to counterclaim in this action. The plaintiffs claim damages in the amount of $1,462, the excess over the contract price they were required to pay for cement to fill the

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contract, admitting that the defendant should be credited against this $1,303.59 for cement actually delivered.

It is clear that the plaintiffs refused to receive the 250 barrels of cement a week, as required by the contract, and in that respect broke the contract and became in default and liable to the defendant for any damage he might sustain thereby. It is undoubtedly the rule of law that one party to a contract cannot recover against the other so long as he himself is in default. Bonesteel v. Mayor, 22 N. Y. 162, 170; Windmuller v. Pope, 107 id. 674.

But the plaintiffs claim that the defendant, by furnishing cement from time to time after March eleventh, thereby extended the terms of the contract, and, beginning from that time, was required to furnish the 250 barrels of cement per week until it was all delivered. We do not find any such agreement, and it would practically require a new contract to have that effect. Clark v. Fey, 121 N. Y. 470.

The only thing that can be claimed as tending to show any such understanding is that the plaintiffs ordered cement from time to time and the defendant filled the orders. But it is to be observed that these orders have no particular reference to the weekly installments mentioned in the contract, but were evidently given for such amounts as the plaintiffs needed. There is some evidence that the defendant stated he considered the contract was still binding, but those statements were made after the defendant's inability to deliver the cement had been demonstrated, and not while the cement was being ordered by plaintiffs and furnished by defendant.

Where one party to a contract requests delay, he cannot defend against the other party because it was granted him. He is estopped from so doing. But here the defendant did not request the delay, and there is no estoppel against him. Thomson v. Poor, 147 N. Y. 402, 410.

The case at bar is one where the vendee refuses to accept the goods at the times agreed upon for their delivery, but thereafter requests a delivery from time to time of some installments, and the vendor delivers as requested and then becomes unable to deliver the balance. The vendee has not kept his contract, but became liable from time to time for the goods he actually received, and the vendor having delivered the goods is entitled to

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pay for them only at the contract price. Bailey v. Western Vermont R. R. Co., 18 Barb. 112.

Notwithstanding the vendor's subsequent delivery of certain installments, it is probable that he might still recover any legal damages he sustained by the vendee's refusing the goods at the time mentioned in the contract. Phillips & C. C. Co. v. Seymour, 91 U. S. 646; Brady v. Cassidy, 145 N. Y. 171, 180; Parke v. Franco-American T. Co., 120 id. 51, 56.

Permitting performance after the time does not extend the time but waives a complete performance. The party not in default may, nevertheless, terminate the contract or suffer it to go on and claim damages. Wyckoff v. Taylor, 13 App. Div. 240.

The performance of the contract, according to its terms, having been prevented by the plaintiffs, the most favorable view to them is that the defendant had a reasonable time after request in which to fulfill, if he were still willing to go on with it, and such reasonable time depends upon all the surrounding circumstances. Simmons v. Ocean Causeway, 21 App. Div. 30, and cases cited.

Under that rule, the defendant being required to furnish a particular brand of cement which could only be made at one mill, and it being conceded that he used every effort he possibly could to obtain it for the plaintiffs, and it appearing that when the plaintiffs required the cement the mill was unable to furnish it, the defendant should not be held liable for failing to furnish the cement as requested. A plaintiff cannot recover in an action against another for breach of contract, except upon showing that he had performed, or is ready to perform; and if it appears that he, directly or indirectly, prevented the other party from performing, and the default of the other party is primarily due to the act or neglect of plaintiff, then no recovery can be had, but the party prevented from performing in full may recover *pro rata*. Otherwise the plaintiff would recover the damages flowing from his own acts. Vandegrift v. Cowles Engineering Co., 161 N. Y. 435, 443; Dolan v. Rodgers, 149 id. 489, *supra*.

After the tests were over and the cement accepted, a large amount was delivered in August. The last cash payment made by the plaintiffs was June thirteenth. That did not include the five carloads which the inspector did not pass and as to which the tests were made. So that in the deal between the parties these

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five carloads and the cement delivered in August was not paid for, and at the time the plaintiffs notified the defendant that they would not accept more cement, and treated him as violating the contract, they were indebted to the plaintiffs in a large amount for cement previously delivered. The contract provided that upon inspection and acceptance of any lot of cement the purchase-price was to be paid. The three carloads shipped in June and the last two in May, which were at first rejected, were good deliveries under the contract, and while the two cars in May were nominally rejected, they were in fact used as soon as received and before the tests.

It therefore clearly appears that upon any theory of the case, while the defendant was concededly making deliveries as required, the plaintiffs were indebted to him and still remain indebted to him for cement previously delivered, and in fact several days before the plaintiffs notified the defendant of their termination of the contract for his nonperformance, the defendant had demanded $1,000 of them upon account which was due them and has not been paid.

The plaintiffs, therefore, made the first default in this contract by refusing to accept the cement as provided for by the contract, and such default must prevent a recovery here by them. The defendant, having delivered cement, as requested, to the plaintiffs who are in default, are entitled to recover for the cement actually delivered. Aside from the plaintiffs' first default, they failed to pay for different lots of cement as soon as inspected. The defendant is entitled, therefore, to recover judgment upon his counterclaim for $1,303.57, with interest and costs.

Judgment for defendant, with costs.

RACHEL ROTHSTEIN, Plaintiff, *v.* MAX ROTHSTEIN, Defendant.

(Supreme Court, New York Special Term, February, 1903.)

Divorce — Filing the interlocutory judgment — Code Civ. Pro., § 1774.

An application for a final judgment cannot be granted in an uncontested action for a divorce unless it appears that the interlocutory judgment was filed in the office of the county clerk more than three months before the application.

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Filing the interlocutory judgment with the clerk of a particular Part of the Supreme Court is not filing it with the clerk of the court, the county clerk.

That the interlocutory judgment was signed more than three months before the application is not sufficient.

APPLICATION for final judgment in an uncontested action for divorce.

Charles Frankel, for plaintiff.

No appearance for defendant.

BLANCHARD, J. Application for final judgment in an uncontested action for a divorce, pursuant to section 1774 of the Code of Civil Procedure. I cannot grant final judgment in this case. Section 1774 of the Code distinctly provides that "No final judgment * * * dissolving a marriage shall be entered * * * until after the expiration of three months after the filing of the decision of the court or report of the referee." It is true that the interlocutory decree was signed more than three months ago, but it was not filed for the requisite period of time. I am not prepared to accept counsel's statement that it was the error of the clerk of the Part that the interlocutory judgment was not filed. There may have been a fee chargeable by the county clerk for the filing of the judgment. Counsel should have been diligent to see that his interlocutory judgment was filed. The mere receipt by the clerk having charge of the Part of the court where the justice is sitting of a paper cannot be deemed the equivalent of filing with the county clerk, who is the clerk of this court. Were it otherwise, a search in the county clerk's office would not disclose the decree, and a party interested would have no means of ascertaining whether or not a decree had in fact been made. It appearing that the interlocutory decree was not filed until February 18, 1903, in accordance with the views expressed I must decline the present application for final judgment.

Application denied.

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ANNE P. GIBSON, Plaintiff, *v.* FREDERICK J. GIBSON, Defendant.

(Supreme Court, New York Special Term, February, 1903.)

Divorce — When the interlocutory judgment may be made final — Code Civ. Pro., § 1774.

The date of the entry of the interlocutory judgment, and not that of the filing of the referee's report, establishes the day from which is to be reckoned the three months after which a judgment for a divorce may be made final, unless for sufficient cause the court in the meantime shall have otherwise ordered.

APPLICATION for final judgment in an action for an absolute divorce.

John J. O'Connell, for plaintiff.

No appearance for defendant.

BLANCHARD, J. This is an application for final judgment in an action for an absolute divorce, pursuant to section 1774 of the Code. The issues were tried before a referee, whose report was filed November 3, 1902. An interlocutory judgment was signed by a justice of this court and received by the clerk of the part where the case was tried. The interlocutory judgment was not, however, filed with the clerk of the court, *i. e.*, the county clerk. I have held that this was not a sufficient filing within the purview of this section of the Code. Rothstein v. Rothstein, 40 Misc. Rep. 101. The proof required by Rule VIII of the rules for the regulation of special terms in this department is not sufficient. The search of the county clerk was made from November 13, 1902, to February 14, 1903, evidently on the theory that the interlocutory judgment had been filed on November 13, 1902, but the application for final judgment, based on the filing of the interlocutory judgment, has been abandoned, and this application is now made on the theory that the three months have elapsed since the filing of the referee's report. The referee's report, however, was filed on November 3, 1902, and

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therefore a search which only commences on November 13, 1902, is insufficient. Disregarding, however, for the present this deficiency in the proof required by the rules, which might easily be corrected, I have decided to pass upon the more important propositions urged by the applicant, that the filing of the referee's report and not the filing of the interlocutory judgment thereon sets the three months' time running under section 1774 of the Code. I have reached the conclusion that the filing of the referee's report will not in itself set the time running, but that an interlocutory judgment is necessary. As this question has not been before passed upon, I have consulted with some of my associates, who agree with me in the conclusion reached. Section 1774 provides as follows: "No final judgment annulling a marriage, or divorcing the parties and dissolving a marriage, shall be entered, * * * until after the expiration of three months after the filing of the decision of the court or report of the refree. After the expiration of said period of three months final judgment shall be entered as of course upon said decision or report, unless for sufficient cause the court in the meantime shall have otherwise ordered." This part of the section would seem to uphold the contention of the applicant. The section, however, continues: "Upon filing the decision of the court or report of the referee, a judgment annulling a marriage or divorcing the parties and dissolving a marriage shall be interlocutory only and shall provide for the entry of final judgment granting such relief three months after the entry of interlocutory judgment unless otherwise ordered by the court." This latter provision is somewhat inconsistent with that portion of the section first quoted, but must be given effect. It will be observed that it distinctly provides that the interlocutory judgment must be entered upon the referee's report, and that only three months thereafter should final judgment be entered. This application should, therefore, be denied, with leave to renew when three months shall have expired from the date of filing interlocutory judgment.

Application denied, with leave to renew when three months shall have expired from date of filing interlocutory judgment.

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LIZZIE S. COWEN, Plaintiff, *v.* WILLIAM W. ROUSS, as Executor, Etc., of CHARLES BROADWAY ROUSS, Deceased, Defendant.

(Supreme Court, New York Special Term, February, 1903.)

Consideration — Complaint for breach of promise, with seduction — Pleading conditions precedent — Code Civ. Pro., § 533.

The compromise of a doubtful claim is a good consideration for a promise to pay money and the promisor cannot subsequently escape payment by showing that the claim was invalid.

A complaint by a woman alleging that for a promise of $50,000 she released a man, since deceased, from all claims on account of or arising out of his having seduced her under promise of marriage and from "any other action which this plaintiff then had or might have had" is not demurrable by his executors on the ground that a woman can have no cause of action for her seduction, for, the clause as to "any other action which this plaintiff then had or might have had" may be taken to mean an action for a breach of the promise to marry, with seduction as an element of damage.

Where the plaintiff has pleaded generally the performance by her of conditions precedent she may properly add an allegation of something else which she agreed to do and which she did.

DEMURRER to complaint.

Jacob Marks (Howe & Hummel, of counsel), for plaintiff.

John A. Rooney, for defendant demurrant.

BLANCHARD, J. This is a demurrer to a complaint. The complaint alleges "that in or about the month of April, 1892, the above-named deceased, Charles Broadway Rouss, in and for the consideration that this plaintiff should release him from all claims and demands that she should have against him, the said Charles Broadway Rouss, on account of or arising out of his, the said Charles Broadway Rouss, having seduced this plaintiff under his promise her to marry, or any other action which this plaintiff then had or might have had, and in full compromise, settlement, accord and satisfaction of all the claims of this plaintiff at that date against him, the said Charles Broadway Rouss promised,

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covenanted, and agreed to and with the plaintiff that he, the said Charles Broadway Rouss, would pay to this plaintiff the sum of $50,000." The first point made by defendant is that the agreement alleged must fail, because the consideration recited was in fact no consideration, the argument being that a woman has no cause of action for her own seduction against the man who seduced her. The allegation, however, is "all claims * * * on account of or arising out of his * * * having seduced this plaintiff under his promise her to marry." The cause of action under this allegation might very well have been one for the breach of the promise of marriage, with the seduction as an element of damage. Such a cause of action would be a claim "arising out of" the seduction under the promise of marriage. The agreement appears to be founded, however, upon the further consideration of "any other action which this plaintiff then had or might have had." I do not think for the purposes of this complaint it was necessary to set forth what such other actions were. Taking this view of the complaint, it does not become necessary for me to pass upon the question presented as to whether the claim plaintiff agreed to release was in fact a valid one, and whether or not it afforded a sufficient consideration for the agreement to pay. Assuming the facts as alleged to be true, as I must for the purpose of the demurrer, it would seem that the decedent considered the claim of sufficient weight to warrant him in agreeing to paying the plaintiff $50,000. I entertain the opinion that the agreement to release an asserted claim, be it valid or not, would be a sufficient consideration. Were the law otherwise, there would be no permanency to a settlement of any asserted claim. The party against whom the claim was asserted, when called upon to keep his agreement, might in every case contend that the claim settled was not a valid one. The decided cases are to the contrary of this proposition put forward by the defendant. Stewart v. Ahrenfeldt, 4 Den. 189; Dovale v. Ackermann, 2 App. Div. 404; Feeter v. Weber, 78 N. Y. 334; Wehrum v. Kuhn, 61 id. 623; Barnes v. Ryan, 66 Hun, 170.

The defendant claims further that the complaint is insufficient in the following respect: By the first paragraph of the complaint before quoted the decedent agreed to pay in consideration that the plaintiff "should release," etc. In the second paragraph of the complaint the plaintiff alleges "that the plaintiff

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fully performed all those acts and things on her part to be performed, being the consideration of the said promise and agreement of said Charles Broadway Rouss to pay her said $50,000, and did agree and did not institute any action or proceeding against said Charles Broadway Rouss, and did accept said promise," etc. The defendant's point is that this is not an allegation that the plaintiff did release decedent in accordance with the terms of the agreement set forth in paragraph first, the argument being that had plaintiff stopped after her allegation that she had performed, etc., it might have been a sufficient allegation under section 533 of the Code of Civil Procedure, but the subsequent allegations as to plaintiff's agreement not to institute an action, etc., was a qualification of the original allegation of performance, and a specific statement of what plaintiff did do, and constituted therefore a limitation of the general allegation of performance. It will be observed that the word "and" is used after the allegation of performance. I do not think the paragraph is open to the interpretation for which defendant contends. I believe it should be construed as an allegation of something additional which plaintiff agreed to do and did. It follows from these expressions of my views that the demurrer should be overruled, with costs, with leave to defendant, upon payment of these costs, to plead anew.

Demurrer overruled, with costs, with leave to defendant, upon payment of costs, to plead anew.

WILLIAM E. NICHOLS and DAVID B. HELM, Composing the Firm of WILLIAM E. NICHOLS & Co., Plaintiffs, *v.* GEORGE C. CLARK, LOUIS C. CLARK, DAVID CRAWFORD CLARK, GEORGE BLAGDEN, Jr., and DONALD G. GEDDES, Composing the Firm of CLARK, DODGE & Co., Defendants.

(Supreme Court, New York Trial Term, February, 1903.)

Statute of Frauds — Acceptance and receipt of shares of stock — Delivery.

Transaction in shares of stock are within the Statute of Frauds.

An oral contract by which stock brokers sell and agree to deliver three days later forty shares of a stock, which they then have, is void under the statute and not enforcible by the buyer where there

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was no note or memorandum of the contract, nor at the time of the making of it any payment of any part of the price, or any delivery actual or constructive — an act necessary to an acceptance and receipt by the buyer.

ACTION for damages.

James R. Ely, for plaintiffs.

Shearman & Sterling (John A. Garver, of counsel), for defendants.

CLARKE, J. Action to recover damages for a breach of contract for the purchase and sale of forty shares of stock of the Mercantile National Bank. Motion to dismiss the complaint upon the opening upon the ground that the alleged contract was void under the Statute of Frauds. Upon this motion the facts must be conceded to be true as follows: Plaintiffs are stockbrokers, not members of any stock exchange. Defendants are stockbrokers and members of the New York Stock Exchange. On the 22d of August, 1902, one of the employees of plaintiffs had a conversation over the telephone with an employee of the defendants, in which he asked what price defendants were putting on Mercantile National Bank stock. Defendants answered 328. Plaintiffs replied: "All right; we will take forty shares at 328." Defendants said: "We will send that stock into you to-day." Plaintiffs replied: "Wait a minute; we do not want it cash; we would rather have it Monday regular." Defendants said: "All right, Nichols; we will carry this stock until Monday if you will pay the interest," and plaintiffs replied: "All right, that is satisfactory to us." Subsequently plaintiffs sent an employee with a comparison ticket to defendants to make a comparison, with respect to said transaction, but defendants refused to compare, claiming there had been a mistake and that they had never sold plaintiffs said stock. The particulars of said mistake are immaterial to this discussion. None of the stock was physically delivered. On the twenty-fifth of August plaintiffs made a demand for forty shares and tendered $13,126.56 in payment therefor, being the purchase price for said shares at $328 a share, together with interest from the twenty-second day of August to the twenty-fifth thereof, inclusive, said last date being the Monday referred to in said conversation. Defendants refused to deliver the stock

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and to accept the money tendered. Plaintiffs having sold forty shares of Mercantile Bank stock after the making of the contract to purchase from defendants, to make their contract good subsequently and on the twenty-seventh of August purchased forty shares at $360, the lowest price it could then be bought, and seek here to recover the difference, $1,273.44, as their damages. It stands conceded that no part of the purchase price was paid at the time of the making of the contract, that no note or memorandum in writing signed by the party to be charged was made, and that no part of the stock was physically delivered. Plaintiffs claim that the transaction was not within the statute in that there was a constructive delivery. It is well settled in this State that transactions in shares of stock are within the Statute of Frauds. Hinchman v. Lincoln, 124 U. S. 38, and cases therein cited. Therefore, no note or memorandum in writing having been made and no part of the purchase price having been paid, the inquiry is confined to whether the buyer "accepted and received" said shares — that is, did the defendants deliver the same to the buyer? The case cited in the Supreme Court of the United States was on appeal from the United States Circuit Court in this district, involved the interpretation of the New York statute, and cited and followed the New York cases. In that case there had been an actual manual delivery of the stock into the hands of a third person to be delivered to the purchaser on payment of the purchase consideration. The following propositions were cited with approval: "To satisfy the statute there must be a delivery by the vendor with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intent of taking possession as owner. It can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intentions of the parties. Mere words are not sufficient. The acts of the parties must be of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer. This is the doctrine of those cases that have carried the principle of constructive delivery to the utmost limit. So long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute. The test for determining whether there has been an actual receipt by the purchaser has been to in-

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quire whether the vendor has lost his lien. Receipt implies delivery and it is plain that so long as vendor has not delivered there can be no actual receipt by vendee." In the case at bar there was no sale of any specific forty shares. All that the defendants had to do was to be ready to deliver on the twenty-fifth any forty shares of said bank stock. Though they had forty shares in their possession on the twenty-second, in the meanwhile they retained them and might have sold or pledged those forty, provided they produced the same number on the delivery day. The price not having been paid they retained with the possession their lien. They did no acts subsequent to the sale showing a change of ownership — quite the contrary. "Mere words are not enough," and there were no words, even. They refused to compare; they said they had not sold; they declared they would not deliver. What subsequent acts or words can be tortured into proof of change of possession, there being no actual change by fact or word, or entry, even? There was a contract for a future delivery on a day fixed of forty shares of stock at $328, plus interest. That is a contract clearly within the statute, and as there was no payment, no note or memorandum, no delivery, and, therefore, no receipt and acceptance, said contract was void. Complaint dismissed. Motion for a new trial denied; thirty days' stay and thirty days to make a case.

Judgment accordingly.

ELIE J. MONEUSE, Plaintiff, *v.* JAMES B. RILEY, GEORGE E. CRAWFORD, BALTHAZARD BRUNNER, J. ADAM BRUNNER, THE COPPER BELLE MINING COMPANY, WILLIAM DIETZ, WILLIAM P. MICHEL, MILO M. WELLS and the KNICKERBOCKER TRUST COMPANY, Defendants.

(Supreme Court, New York Special Term, February, 1903.)

Injunction — Stockholder's action against a foreign corporation for an accounting — Effect, on the issue of an injunction, of denials.

Where it appeared, in an action brought by a stockholder of a foreign corporation to compel it and its directors to account, that, for no sufficient reason, the plaintiff had been denied access to the books, that although the defendants had, at the last annual meeting

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of the stockholders, declared the corporation solvent, attachments, reducing it to insolvency, had been levied immediately after the meeting, that it was insufficiently denied that the directors, acting as such, had been dealing in the stock of a mining company to the detriment of the corporation, and further, that they were unable to account for all its stock, there being a discrepancy as to the amount of stock which should be in the treasury, the court granted, as to directors and as to property within the jurisdiction, an injunction restraining them *pendente lite* from disposing of any stock in their names or under their control or covered by a certain pooling arrangement, but refused any injunction which should interfere with the exercise by the foreign corporation of its charter powers.

Where affirmative matter, set up by the defendants, negatives, by necessary deduction and inference, their own denials, the latter fall to the ground and the court can test the truth by the defendants' affidavits without seeking it from the allegations and denials of the moving and opposing papers.

ACTION by a stockholder on behalf of himself and others similarly situated to compel an accounting. Motion to continue *pendente lite* an injunction.

Henry J. Mayer, for plaintiff.

James F. Mack (William Blaikie, of counsel), for defendants Riley and Crawford and the Copper Belle Mining Company.

J. Sidney Bernstein, for defendant J. A. Brunner.

Joseph N. Goldbacher, for defendant B. Brunner.

LEVENTRITT, J. This is a stockholder's action, brought by the plaintiff on behalf of himself and others similarly situated, to compel an accounting by the defendant directors of the defendant Copper Belle Mining Company for their official conduct in the management of the affairs of the corporation. The present motion is one to continue *pendente lite* a very sweeping injunction heretofore obtained restraining the defendant directors from disposing of their or the corporation's stock, receiving or issuing any, or in any wise dealing with the moneys, property or assets of the cor-

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poration, or from operating, continuing and carrying on the corporation's business of mining, milling and smelting copper ore, and of running a company store in connection therewith.

The moving papers charge the defendants with fraud, misappropriation of assets, unauthorized stock issues to themselves, and in general with a conspiracy to wreck the corporation for their benefit. They charge that the defendants, while directors and officers of the Copper Belle Mining Company, without consideration, or for inadequate consideration, issued to themselves large blocks of stock, failing to account therefor; that they have dealt with the property of the corporation for their own benefit; that they have received commissions upon the selling price in the market for capital stock sold; that they have voted to themselves large salaries; that they have loaned the funds of the company to other corporations without consideration; that they have refused advantageous offers for the property and given an option for an insufficient sum; that they have denied access to or inspection of the books; that at the last annual stockholders' meeting and continuously theretofore they had represented the company to be entirely solvent, when, in fact, as proved by the levying of attachments for large sums against the property of the company shortly after that meeting, the company was insolvent. It is also charged that the directors transferred to the treasurer of the company stock of another mining company, the Copper King, taking in exchange share for share the company's stock, and subsequently selling on behalf of the company, the Copper King stock at a nominal price per share. Certain individual, illegal, unauthorized acts are also charged up against the defendants Riley and Crawford, primarily the former, who is accused by a former secretary and director of the company with depositing moneys received from the sales of corporate stock in his personal account.

Were all these charges substantiated there could, of course, be no question as to the plaintiff's right both to an account in the action and the continuance of the preliminary injunction. A volume of affidavits is offered in support of the plaintiff's charges; a volume is offered denying them. It has been a matter of considerable difficulty to sift the accusations and denials, to find what accusations are in fact denied or what denials are effective. On the other hand many of the charges necessarily fall in that they are not made upon knowledge, or upon such disclosed information

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as would justify their acceptance. Many of the plaintiff's statements and those of his supporting affidavits are necessarily on information, as the truth could only be disclosed upon an examination and inspection of the books and this has been denied him. So far as these statements or charges are concerned they must be rejected as the court may not speculate or even infer the probability of their truth from the general scheme of the whole case as set out in the affidavits. Proof, not presumption, is required when the drastic remedy sought by this motion is involved. Rejecting these matters and certain others which on the papers it must be held the defendants sufficiently meet, there remain several important matters unexplained, and at least two items undisputed, which render a limited injunction pending the action proper.

I accordingly dismiss the questions of commissions, excessive salaries, loans to other corporations, refusal of advantageous offers for the property and the question of options. I also dismiss the question of the unauthorized issue of stock to themselves in the first instance. On the other hand the explanation offered of the denial of right of access to the books is unsatisfactory. Seeking refuge in an unreasonable by-law of their own making is not evidence of that candor with which the defendants profess to meet the charges laid at their door. Nor is the explanation offered that on advice of counsel a promised inspection was denied for fear that it was a mere "fishing" expedition, consonant with the defendant directors' attitude. In view of the proceedings leading up to the respective demands, and the iterated assertions that the books were honestly, regularly and properly kept, and that there was nothing concealed or to conceal, it is difficult to see why the stockholder should be denied the right to "fish" for the truth. Nor is the explanation of the representation of solvency of the corporation at the time of the last annual stockholders' meeting when attachments were levied almost immediately thereafter satisfactory. To say that the manager or superintendent of the mine or store had not informed the two directors who practically had the exclusive management of the corporation in their hands, and one of whom had but returned from the mines whither he had gone to make a thorough examination of its affairs, is, to say the least, to confess inefficient management.

Again, the so-called Copper King transaction, above referred to, is not met in a manner required by the very circumstantial and

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detailed nature of the charge laid. One of the two denials made by the defendants Riley and Crawford — there is none at all by the defendant Brunner — comes dangerously near being a negative pregnant, while the other, denying that any such transaction as alleged ever took place, is not very much more satisfactory. There is no statement that *no* dealings or transactions or transfers were ever had with Copper King stock, or, if there were in fact, what was the nature of the deal. This, in frankness, should have been stated, in view of the affiant Barnes' allegations that, after he had surrendered to the defendant Crawford a certificate of Copper King stock for the purpose of exchange, another certificate for the same number of shares, but differently numbered, was afterwards returned to him as his original with the statement that it could not be disposed of.

There are other inadequate denials — as for instance that of the charge that the defendant Riley had deposited corporation moneys in his own account — but those adverted to are sufficient for the purpose of showing that the opposing papers, while profuse in denials, do not in many instances meet the allegations in the manner which their serious nature would seem to call for.

Were the granting of any relief, however, dependent merely on the facts so far outlined, I do not think we should be on sufficiently firm ground. But taken in connection with what is about to be set forth — in itself good ground for granting some relief — they acquire, perhaps, on these papers at least, a different significance, and make out a case for the plaintiff.

It is true the defendants Riley and Crawford deny that they have not accounted for every share of corporate stock, and, in different parts of their very voluminous affidavits, deny various allegations in that regard with more or less detail. But mere *pro forma* denials are not always sufficient to bring a case within the rule that where all the equities of the complaint and affidavits are denied, an injunction cannot issue. Where affirmative matter set up by the defendants negatives by necessary deduction and inference their own denials, those denials fall to the ground, and the court is in a position to test the truth on their own affidavits without resorting to the dangerous practice of seeking it, on motion, out of the allegations and denials of moving and opposing papers.

On their own statements I find that the defendants have not

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accounted for all of the corporate stock. It appears practically undisputed that the entire manipulation of the stock issues, transfers, etc., was in the exclusive charge of the defendants Riley and Crawford. Although there were two other directors, the defendants Brunner, one of whom was nominally president for a period of time, their affidavits, as well as the whole case as submitted, satisfies me that Riley and Crawford, and especially Riley, ran the corporation. Brunner, the erstwhile president, swears that he never acted of his own initiative, doing simply what Riley told him to do, going even so far as to make out checks in blank and turning them over to Riley.

The defendants Riley and Crawford swear to two joint affidavits setting forth, among other things, the history of the stock issues of the defendant Copper Belle Mining Company. They profess to account for the disposition of every share. Having had, as disclosed by the papers, control of the issue and distribution, they, if anybody, must know what has become of the shares, and contradictions and discrepancies in their statements must be taken against them. Their statements are not on information but necessarily on knowledge.

It appears then that when the Copper Belle Company was formed, December 28, 1898, it was capitalized at $300,000, consisting of 300,000 shares of the par value of $1 each. Riley and Crawford swear that this entire issue went to Crawford in payment of certain mining claims to be divided by him among Riley, the two Brunners and himself in proportion to their interests in these claims which he held as trustee; that only 60,000 of the 300,000 shares were in fact utilized for this purpose and that at one time or other the balance, that is, 240,000 shares, were transferred to the treasury of the company for the purpose of realizing upon them and thus to raise funds for the development and exploitation of the mines. Prior to July 23, 1900, every share of the 240,000 had been sold or disposed of, or, in the words of Riley and Crawford "all of the stock contributed to the treasury of said company had been sold and exchanged for property and services."

On or about the date last mentioned the capital stock was changed or increased from 300,000 shares of the par value of $1 each to 200,000 shares of the par value of $5 each. A basis of exchange was duly made and announced by the com-

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pany being two shares of the old, or $1 stock, for one share of the new or $5 stock. Notices were sent to all the stockholders specifying a time — not disclosed in the papers — within which they would have to avail themselves of the option of exchange. Riley and Crawford swear that as there were 300,000 shares of the old stock to be exchanged, "it *took* 150,000 shares of the new stock for the exchange." The conclusion is direct that Riley and Crawford meant by this statement that 150,000 new shares were in fact exchanged for 300,000 old shares. This is borne out by their immediately following statement: "This left 50,000 shares of the new stock in the treasury, which 50,000 shares are now in the treasury of the company." Accepting this latter statement as true, it incontestably appears from other portions of the same affidavit directed to meet other charges in the moving papers, that less than 150,000 shares of the new stock were in fact issued, and that there should be more than 50,000 shares of the new issue in the treasury.

This appears from the following facts: The plaintiff charges that one Twomey or Toomey, a superintendent of the company, in January, 1899, received 6,000 shares of stock for services; that he was subsequently ousted and transferred his shares to the defendant directors, when it was understood and agreed that this stock was to be returned to the treasury. Riley and Crawford, in their affidavit, admit the transaction except that the 6,000 shares were in fact returned to the treasury of the company "where they have ever since remained." It appears clearly that this stock was not exchanged, that the ex-superintendent failed to avail himself of the option, and that on account of his default the company was enabled to buy it in "at an amount greatly in reduction of its value and of the selling price of the stock at that time."

The defendants Riley and Crawford make similar allegations to meet other charges in the complaint and affidavits as to about 10,000 other shares of the original stock held by certain parties in Boston, who, as they claim, like the ex-superintendent, failed to avail themselves of the option for exchange. They say: "The company bought in under the same conditions as the Toomey stock about 16,000 shares in all, inclusive of the Toomey stock." This stock was likewise "transferred to the company's treasury for the benefit of the company, where it has remained ever since."

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It then appears, on their own statements, that at least 16,000 shares of the original issue or $1 stock were never offered in exchange for the new or $5 stock, and as the basis of exchange was one of the new for two of the old, that at least 8,000 shares of the $5 stock did not go out of the treasury to retire double the quantity of dollar shares. In other words, it did not take, as the defendants named allege, 150,000 new shares, to retire 300,000 old shares, but only 142,000 new shares, because only 284,000 old shares were offered and surrendered in exchange. And there were not merely 50,000 new shares left in the treasury after the exchange had been consummated, but 58,000 shares. What has become of these 8,000 shares? The defendants Riley and Crawford, by their affidavits, allege that they were issued in exchange for 16,000 old shares, yet these very affidavits show that they were not.

It also conclusively appears that at least 7,000 of these 8,000 new shares, unaccounted for, were issued, but to whom, when, why, and for what consideration does not appear. Speaking of the present, Riley and Crawford swear that there are now "issued and outstanding 149,000 shares of stock of the Copper Belle Mining Company," or, in other words, that there are in the treasury 51,000 of the 200,000 new shares. After the exchange there must have been at least 58,000 shares. The discrepancy is not accounted for, and no explanation is offered by those who had the exclusive charge and control of the stock transactions and who must be deemed to have known what became of them.

Further than this, the explanation as to what has become of the 16,000 old shares purchased and which it is claimed went into the treasury of the company, is far from being satisfactory. Riley and Crawford allege that these were bought in on behalf of the company at a greatly reduced figure; "that a full statement of the transactions with respect to said stock so purchased by the company * * * was made to the stockholders' meeting next held after said transactions took place * * * in which statement the Toomey stock and the other stock bought under like conditions of that of the Toomey was bought, in all about 16,000 shares as above set forth, was shown to be bought by the company and charged to it and deposited for it in its treasury, a copy of which statement is hereto annexed and marked Exhibit A. * * * Said Exhibit A is taken from the official min-

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utes of the said stockholders' meeting held on the first day of May, 1902, which minutes are the official records of the company."

Turning to Exhibit A, which is entitled "Financial Statement of the Copper Belle Mining Company for one year ending March 31st., 1902," we find under the head of Disbursements only three items of stock purchases as follows:

"June	30.01,	Purchased	4300	shares	of	stock,	17,000
"Sept.	26. "	"	1850	"	"	"	3,087.50
"Oct.	26. "	"	1850	"	"	"	3,087.50."

Thus the official records of the company show total purchases of 8,000 shares for a total of $23,175. But this statement, by which the defendants Riley and Crawford, for the purpose of this motion, at least, are bound, fails to account for one-half of the 16,000 shares. Nowhere in the statement is there any item of stock purchase beyond these 8,000 shares. What has become of the other 8,000? Further, the shares purchased were secured at approximately $3 per share, a valuation far in excess of that at which it is alleged the 16,000 shares were bought in. It might be maintained that these latter shares, being equivalent to 8,000 of the new shares, are entered as new shares in the books. To this it must be answered first, that there is no allegation of the purchase of any new shares, and secondly, that even on that basis it would show a purchase price of approximately $1.50 per share, again a price far above par instead of, as the defendants allege, greatly below it. It is manifest that if the defendants' statements that owing to the holders' failure to avail themselves of the option to exchange, their stock was subsequently bought in at a low figure, that is, less than $1 per share, is true, the items included in the statement are not the 16,000 shares of the original issue outstanding and that these remain unaccounted for.

I deem it unnecessary to pursue further the inquiry into the facts.

Without further characterizing the acts of these defendant directors, I am of the opinion that the plaintiff makes out his case, and that he is entitled to injunctive relief. Whether, on the theory of waste, misappropriation, gross negligence or other wrongful acts, equity can call the directors to account and in the

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meanwhile protect the plaintiff and those situated similarly with him. Toward the plaintiff and other shareholders the directors' relation is in the nature of trustee and *cestui*. Brinckerhoff v. Bostwick, 88 N. Y. 52, 53. "Equitable jurisdiction extends to all culpable acts and omissions of the directors, by which the pecuniary interests of the corporation are or may be injured. If they are treacherous to its interests and appropriate its property, or intentionally waste its assets * * * they are liable to account in equity to the corporation or its representatives, not only for the money or property in their hands, but also for such as they fraudulently disposed of or wasted, as well as for the damages naturally resulting from their official misconduct." Bosworth v. Allen, 168 N. Y. 157, 166.

While I am of the opinion that an injunction is proper, it is clear that the preliminary injunction is too sweeping. Under the decision of Hallenborg v. Greene, 66 App. Div. 590, there can be no injunction restraining in effect the Copper Belle Mining Company, which is a foreign corporation, from the exercise of its charter powers. The proper tribunal for an injunction against the disposal of corporate products and the receipt of debts and obligations due the corporation, or from mining, milling, or disposing of any ore or carrying on its business, is a court of general jurisdiction in Arizona. It appears from the papers that a receiver has already been there appointed and no order of this court would be effectual to control his actions.

The court can only act on the defendant directors who are by proper service within its jurisdiction and on property located here.

The defendants should be enjoined from in any wise interfering with or disposing of the stock standing in their own names or under their control, especially with that deposited with the Knickerbocker Trust Company under the pooling agreement. As to any other matters to which the injunction should be extended, I will hear counsel on the settlement of the order.

There is no force in the preliminary objection, as this application may be treated as an original motion for a new injunction.

Motion granted as indicated.

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MINNIE NUSSBERGER, Plaintiff, *v.* EDWARD WASSERMAN and EMMA S. WASSERMAN, his Wife, and HARVEY MURDOCK et al., Defendants.

(Supreme Court, New York Special Term, February, 1903.)

Stay of another action — Foreclosure of a mechanic's lien — Filing lien necessary to a personal judgment — Code Civ. Pro., §§ 3403, 3412.

Although there is a substantial identity in the parties, subject-matter and issues of two actions brought respectively in the Supreme and another court, the Supreme Court should not stay the other action where there cannot be obtained in the Supreme Court action by a party entitled to relief the entire relief which he can obtain in the other action.

In an action to foreclose a mechanic's lien a personal judgment against the contractor cannot be obtained by his immediate subcontractors unless they have filed a lien.

Where the assignee of lienors under subcontractors has a suit pending in the Supreme Court to foreclose the lien, in which the contractor is a defendant, and it appears that neither his immediate subcontractors, nor their trustee in bankruptcy, made a party defendant, have ever filed a lien for a debt due by him to them for labor and materials furnished to the premises, his motion to stay another action brought against him at law by the trustee in another court for the same debt must be denied by the Supreme Court because the trustee, for failure to file a lien, could not recover in the Supreme Court action any personal judgment against the contractor and, therefore, the relief obtainable, in the two actions, by the trustee is not the same.

MOTION by defendant Murdock for a stay, pending the final determination of this suit.

Kenneson, Crain, Emley & Rubino (Charles L. Apfel, of counsel), for defendant Bostwick, trustee.

Seligman & Seligman (Geo. W. Seligman, of counsel), for defendant Murdock.

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LEVENTRITT, J. This is a motion made by the defendant Murdock to stay, pending the final determination of this suit, an action brought against him in the City Court by the defendant Bostwick, as trustee in bankruptcy for the defendants Greene and Ward.

The facts leading up to this application are briefly as follows: The present action is the usual statutory proceeding for the foreclosure of a mechanic's lien. It appears that in March, 1901, the defendant Wasserman contracted with the defendant Murdock as principal contractor for work and materials in and about a building on premises owned by him. Thereafter, on March 7, 1901, the defendant Murdock contracted with the defendants Greene and Ward, subletting to them all the ironwork. Thereafter, on June 12, 1901, the defendants Greene and Ward contracted with plaintiff's assignor to furnish certain specified items of the ironwork. Greene and Ward, after having partially completed their work, became insolvent and abandoned the contract. Subsequent proceedings in bankruptcy resulted in the appointment, on September 14, 1901, of the defendant Bostwick as their trustee. Under the terms of the contract between the defendant Murdock, the principal contractor, and Greene and Ward, the former completed the contract, and it is alleged in the papers on this application, that he has an unexpended balance to the credit of the latter in the sum of at least $283.

The plaintiff's assignor having duly filed a notice of lien, this action was begun on or about October 10, 1902. Wasserman, the owner, Murdock, the principal contractor, Greene and Ward individually and their trustee in bankruptcy, Bostwick, and the American Surety Company, who had given a bond to discharge the lien of plaintiff's assignor, were made parties. Greene and Ward never filed a notice of lien, nor did their trustee. The answer of the latter is in effect a general denial; he asks no affirmative relief, but prays a dismissal of the complaint.

About two weeks after the commencement of this action, that is, on October 28, 1902, the defendant Bostwick, as trustee, began an action in the City Court against the defendant Murdock, suing him on contract on two causes of action for work done and materials furnished. The first, to recover the sum of $533.50, is for the alleged balance due from the defendant Murdock, as and for the agreed price for services rendered and materials furnished

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him in and about the structural ironwork for the building involved in this suit. The case in the City Court having been noticed for trial and a preference having been claimed under the Code, the defendant Murdock makes this motion to stay the City Court action until the issues herein have been finally determined.

The serious objection to the allowance of the stay is that it bars the remedy of the defendant Bostwick, trustee. No lien has been filed by the defendant bankrupts. They were under no obligation to file one, and the omission, of course, in no wise precludes their right to sue their superior contractor to recover a personal judgment. Were it in the power of the court to award them a personal judgment in this action, I believe the other objection could be lightly dismissed. Even though the court should have no power to stay in this action the City Court action as such, it could nevertheless reach the same result by acting upon the parties to this suit. And there would then also be little force to the objection that there was a diversity of parties or lack of identity of the subject-matter for the issues in litigation between Bostwick, plaintiff, and Murdock, defendant, in the first cause of action in the City Court suit, and between Bostwick, defendant, and Murdock, defendant in this suit, would be substantially the same. But even where there is this substantial identity, and yet the entire relief sought in the one action cannot be obtained in the other, no authority for granting the stay exists. Burlingame v. Parce, 12 Hun, 149; Matter of Lyman, 32 Misc. Rep. 622. Unless the decision in one action will determine the right set up in another, and the judgment in the one dispose of the controversy for both, no case for a stay is presented. Dolbeer v. Stout, 139 N. Y. 487. Unless, then, the defendant trustee can obtain in this suit a personal judgment against Murdock, the party primarily liable to him, and whom he is seeking so to cast in the City Court action, a stay would be improper.

No lien has been filed by or on behalf of the bankrupts; their trustee's answer prays no affirmative relief. Can, under these circumstances, a personal judgment be rendered in his favor? Were this an open question, I might seek to draw a distinction between the earlier and later statutory enactments affecting the foreclosure of mechanics' liens and, rejecting too close an adherence to form, answer in the affirmative. But a continuous line of authorities permits no such alternative.

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Our courts have gone to the extent of permitting a personal judgment where a valid lien existed at the beginning, but was lost by lapse of time or otherwise pending the proceeding, so that there was no lien when the action came to trial (Glacius v. Black, 50 N. Y. 145; 67 id. 563) — this being on the theory that the act of the law should not deprive the lienor of a part of the relief to which he was entitled when the proceeding was commenced. So, personal judgment has been allowed where the enforcement of a valid lien has been prevented by the foreclosure of a prior mortgage on the property (Crouch v. Moll, 8 N. Y. Supp. 183) or where the alleged lien becomes ineffective owing to some informality or defect rendering it unenforceable. Altieri v. Lyon, 13 N. Y. Supp. 617; Smith v. City of New York, 32 Misc. Rep. 380. But the authorities seem clear that where there has been no lien whatever filed, valid or invalid, no personal judgment can be had under statutes permitting such relief "in addition to" the foreclosure or upon failure "to establish a valid lien."

The first important case (Burroughs v. Tostevan, 75 N. Y. 567) arose under the law of 1862 (Chap. 478, § 13), which provided that "judgment may be rendered against the contractor, or subcontractor, for the amount which should be found owing by him, *in addition to* judgment hereinbefore provided for against such owner," *i. e.*, the judgment of foreclosure. In that case a materialman failing to establish his right to a lien, the claim not being one for which, under the act, he was entitled to that form of equitable relief, sought personal judgment. The court, making its decision turn upon the words "in addition," disposed of the right to such judgment in this language: "The Legislature, as an incident to the proceeding to enforce the lien, when there is also personal liability for the debt, by the thirteenth section of the act in question, permits in the same action a recovery *in rem*, and in addition a judgment *in personam*, against the debtor. We cannot, without disregarding the material force and meaning of the language of this section, hold, that it authorizes a personal judgment against a contractor, independent of, and unconnected with a judgment, establishing and enforcing the lien." Summing up its conclusion, the court say: "If the action fails * * * for the reason that no lien was ever obtained, it fails altogether."

This case was followed in Weyer v. Beach, 79 N. Y. 410, and

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there the court elaborated the argument holding that the proceeding being purely statutory could be resorted to only in a case falling within the statute, that is where a mechanic's lien exists. "The main object of the proceeding is to enforce the lien, and the power to render a personal judgment is merely incidental to the main purpose, and to avoid the necessity of resorting to a separate action. But where no lien exists, this form of proceeding cannot be resorted to for the purpose of enforcing a mere personal contract between parties, and the unfounded allegation of the existence of the lien does not authorize the substitution of this proceeding in place of the proper common law action. If it did, all demands on contracts relating to building, and many others, might be enforced by proceedings under the statute, by simply making the false allegation that a lien had acquired * * * But in no case has it been held that where no lien ever existed the proceeding can be entertained for the mere purpose of enforcing a personal contract."

These cases have been cited with approval and made the basis of decisions under the present Lien Law (Laws of 1897, chap. 418, and embodied, so far as the proceedings for the enforcement of mechanics' liens are concerned, in §§ 3398–3418 of the Code). Section 3412 of the Code reads: "If the lienor shall fail, for any reason, to establish a valid lien in an action under the provisions of this title, he may recover judgment therein for such sums as are due him, or which he might recover in an action on a contract, against any party to the action." It will be noticed that this section is much broader than that under which Burroughs v. Tostevan and Weyer v. Beach, *supra,* were decided. Yet following these cases, our Appellate Division held, in effect, in McDonald v. Mayor, 58 App. Div. 74, that only a *lienor* could avail himself of any rights thereunder. "But where a lien does not actually exist, a party cannot invoke the equitable powers of the court upon the mere pretense of such existence, and thereby deprive his adversary of what he otherwise would be entitled to, viz., a trial by jury." To the same effect is Cody v. White, 34 Misc. Rep. 639, and most recently the case of Castelli v. Trahan, 77 App. Div. 472, reannounces the rule as "established by authority that in the absence of a valid lien there can be no personal judgment in actions of this character."

In view of this unbroken line of authority it would be futile

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to seek to set out here a broader interpretation of the sections in question, even though it might be shown that the recent cases, under broader statutes, are directly founded on the earlier Court of Appeals cases based upon statutes whose language was more restricted.

I have been able to find but a single case where personal judgment was permitted in the absence of a lien. That is Thomas v. Sahagian, 10 N. Y. Supp. 874. This was affirmed in the Court of Appeals *sub nom.* Thomas v. Stewart, 132 N. Y. 580, but without the point here discussed being there passed upon, although it may reasonably be said to have been involved in the decision. But that case was decided under section 15 of the Laws of 1885 (Chap. 342), which permitted "any *claimant*" who failed to establish a valid lien, to recover a personal judgment against the party primarily liable to him. The present law limits it to any "*lienor*," obviously a narrower term. Following McDonald v. Mayor, *supra,* which is binding upon this court, I am constrained to hold that a claimant who has never attempted even to file a lien, cannot have the additional relief granted to one who sought to become a lienor.

In conclusion, reference should, perhaps, be made to section 3403 of the Code to the effect that "The court may adjust and determine the equities of all the parties to the action and the order of priority of different liens, and determine all issues raised by any defense or counterclaim in the action." This section, however, is merely a substantial re-enactment of section 17 of chapter 342 of the Laws of 1885, which was construed in Alyea v. Citizens' Savings Bank, 12 App. Div. 577, where the court say: "It is quite clear, in view of the context, that these equities are only such as arise by reason of *liens* which exist upon the property and the determination of which is necessary to the settlement of the rights of the parties to the action."

I think, therefore, that it is clear, under the authorities, that the defendant Bostwick can secure no relief in the present action and that a stay of any part of the City Court suit would consequently be improper.

The motion must be denied. No costs are allowed.

Motion denied; no costs.

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Matter of the Application of JOSIAH CANTER, to Vacate the Service of a Subpœna upon him.

(Supreme Court, New York Special Term, February, 1903.)

Deposition taken within for use without the State — Power of non-resident commissioner to act here — Code Civ. Pro., §§ 914, 915, 919.

It is not an objection to the validity of a subpœna, duly issued by the Supreme Court of the State of New York upon a commission issued by a foreign court to take testimony within the State of New York for use without that State in an action pending in the foreign court, that the commissioner named is not a resident of this State and is a resident of the foreign State.

The commissioner derives all his authority from the foreign State and court and when he comes here to act we recognize by comity his authority and selection.

Our Legislature may by law enforce attendance before any person named by the foreign court.

MOTION to vacate a subpœna.

Franklin Bien, for petitioner.

Herbert R. Limburger, for defendant.

LEVENTRITT, J. This is an application to vacate a subpœna served on the applicant, requiring him to appear and be examined in this State before a commissioner named in a commission issuing out of the State of Delaware, for use in an action pending in that State. The single question up for consideration is whether the subpœna can stand and attendance be enforced, inasmuch as the commissioner named is not a resident or citizen of this State, but comes from the State of Delaware, to which he owes allegiance, for the sole purpose of executing the commission.

The question is narrow and novel, and search has failed to disclose any authority *pro* or *contra*. Yet the question is not difficult. Starting with the premise that the Legislature has in-

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herent power to confer on any person the right and authority to administer an oath, the point resolves itself merely into one of statutory construction. What has the Legislature enacted?

There is, of course, no inherent power in the court or in any of its officers to compel a person in this State to give testimony for use without the jurisdiction. Such authority as there is for taking the testimony of a witness in this State for use without it is contained in sections 914 and 915 of the Code and rule 17 of the General Rules of Practice. Matter of Spinks, 63 App. Div. 236. The reason for the enactment of those sections is to be found in principles of comity. Even as we expect our sister States, as well as foreign countries, to assist us in the administration of justice within our territorial jurisdiction, so we have made provision to lend them similar aid. And where our enacted laws have been insufficient to give the full measure of substantial relief sought, we have amended our statutes, not for our benefit, but for theirs, so as to give them the testimony asked. So when it was found that there was no authority for an issuance of a subpœna *duces tecum* to compel the production of books and papers in a proceeding of this kind (Matter of Strauss, 30 App. Div. 610), the Legislature gave the remedy by amendment. Laws of 1899, chap. 502. And again, where the remedy seemed jeopardized by inability, under the existing law, on the part of the court, or the officer taking the deposition, to punish a recalcitrant witness for contempt (Matter of Searls, 155 N. Y. 333; People ex rel. McDonald v. Leubischer, 34 App. Div. 577) a provision was added to meet this condition. Laws of 1899, chap. 502.

These amendments and decisions are referred to for the purpose of showing the liberality that has characterized successive enactments and the broad conception of comity on which they have proceeded. The primary aim has been to enact a statute that shall be sufficiently broad to give complete assistance to the court to which we extend comity.

Turning now to the Code we find but three sections referring to depositions taken within the State for use without the State. Section 914 provides that a party to an action pending in a court without the State may obtain the testimony of a witness and in connection therewith the production of books and papers. Section 919 prescribes the manner of taking and of making return to the foreign court, regulating the practice according to the

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requirements of the tribunal without the State. Section 915, which is the material section on this application, regulates, in connection with rule 17 of the General Rules of Practice, the procedure to be followed. So far as here material that section reads: "Where a commission to take testimony, within the state, has been issued from the court in which the action is pending * * * the supreme court, or the county court, or a judge of either court, shall, in a proper case, on the presentation of a verified petition issue a subpœna to the witness, *commanding him to appear before the commissioner, named in the commission;* or before a commissioner, within the state, for the state, territory or foreign country, in which the notice was given, or the proceeding taken; or before the officer designated in the commission, notice, or other paper, by his title of office; at a time and place specified in the subpœna, to testify in the action, suit or special proceeding."

It will be observed that of the three classes of persons before whom the witness may be required to appear we defer, in the first instance, absolutely to the court without the State. In the alternative, attendance may be ordered before a commissioner within the State, of the jurisdiction in which the testimony is to be used, and this is done so that the testimony may be taken before an officer authorized to administer oaths for and on behalf of the foreign tribunal. Otherwise, were our courts or judges arbitrarily to designate any person to take the deposition, the result might well be that it would be valueless when returned, as the oath may have been administered by an unauthorized person. The second alternative, *i. e.*, "the officer designated in the commission by his title of office" would seem to apply to a case where no commissioner is stated by name, but merely by title of office. Neither this provision nor the first, with which we have primarily to do, contains any requirements of residence or citizenship within this State; indeed, the first alternative contains such requirements, if at all, only by implication. It is difficult to conceive how the Legislature could have adopted broader or more comprehensive language than in the first provision commanding attendance "before the commissioner named in the commission." The term "commissioner" has no limited or specific meaning. It is merely the legal designation or characterization of a person having the lawful warrant to do a certain act. It is a general term, not a specific title, involving in its conception as applicable

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thereto any particular set of legal principles. A person becomes a commissioner simply by being named in the commission. In other words, the legal effect of the language "commanding him to appear before the commissioner named in the commission" is the same as if it read "commanding him to appear before any person named in the document or instrument issuing from the foreign court." We yield to that court in the selection of the person before whom the testimony is to be taken. Beyond the fact that we demand compliance with the jurisdictional requirements, and protection to witnesses subject to our process to the extent that good faith shall characterize the application (Rule 17) we have no further interest in the proceeding. For the purpose of taking testimony for use in a foreign jurisdiction, the commissioner is not to be regarded as deriving his authority from this State or in anywise connected with its administration of justice. Even where he is designated by the title of office, that is merely descriptive, so far as our courts are concerned. He is not acting as an officer of this State, judicial or otherwise. His source of authority is beyond our borders; his official status for the purpose of the proceeding is created and established there. We recognize it here to the extent of assisting the foreign court, as it asks to be assisted, in accordance with well-established rules of comity.

The Legislature might, in its wisdom, have provided that depositions for use without the State should only be taken before commissioners who are residents or citizens of this State. It has not done so. There is no rule of construction of which I am aware, nor any constitutional or statutory provision, preventing it from enacting a law enforcing attendance before any person named by a foreign court. This it seems to have done in the broadest language possible, and under it I hold that there was full power in this court to command attendance before the commissioner named, who owed no allegiance to this State, but who was a citizen and resident of the State of Delaware and who came into this State for the sole purpose of executing the *dedimus* of the Superior Court of that State.

It may be said in passing that the fact that the procedure here adopted is unusual is no additional reason for declaring it illegal. That the execution of commissions is intrusted as a general rule to residents of the State in which the witnesses are, is in the over-

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whelming majority of cases a matter of convenience. It is simpler, more expeditious, and less expensive for a party in a suit pending in the State of California, for instance, to pray the court to designate somebody in the State of New York, than to send a commissioner from there. And even in contiguous States it means a saving of time and money to secure a local official. But these matters of convenience do not affect the question of legal right. That, as said at the outset, is simply a matter of statutory construction.

Finally, a word should be said in answer to the claim of the applicant that the designation by a foreign court of a nonresident or alien may involve the invasion of the rights of our citizens and of their undue harassment without limitation. There might be some force to the point were the examination allowed without application to our courts. Such, however, is not the case. Not only must there be compliance with the jurisdictional requirements of the Code, but in addition rule 17 of the General Rules of Practice prescribes that the verified petition called for by section 915 of the Code must contain a general statement of the nature of the action or proceeding, show that the testimony of the witness is material to the issue therein presented, and show by copies, or by alleging their substance, the authority pursuant to which the deposition is taken and "unless the court or judge is satisfied that the application is made in *good faith* to obtain testimony within sections 914 and 915 of the Code of Civil Procedure, he shall deny the application." Parties and witnesses are thus amply protected. Beyond this, a witness has the right to move to vacate the subpœna for jurisdictional defect, but he cannot attack for insufficiency the proof by affidavit made to the court on the basis of which the subpœna was granted. Matter of Garvey, 33 App. Div. 134; Matter of Heller, 41 id. 595; Matter of Dittman, 65 id. 343. No question, however, is raised on any point beyond the strictly jurisdictional one, and as to that, for the reasons stated, I have concluded to deny the motion, with $10 costs.

Motion denied, with $10 costs.

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CLARK V. DUNLOP, Plaintiff, *v.* LAWRENCE V. MULRY et al., Defendants.

(Supreme Court, New York Special Term, February, 1903.)

Contempt, civil — Disobeying an order to complete on a judicial sale — Defects in practice and papers — Code Civ. Pro., §§ 14, 2269.

A motion to punish a purchaser at a foreclosure sale for a contempt in having failed to comply with an order directing him to complete must be made by an order to show cause and is fatally defective if made on notice of motion.

The papers are fatally defective where they fail to show any facts from which the court can adjudge that any right or remedy of the plaintiff has been defeated, impaired, impeded or prejudiced.

Where the court by an oversight ordered the purchaser to complete on the very day the order was made, it directed the order resettled to the end that it might determine whether it would direct completion of the sale or a resale, the purchaser to be liable for the deficiency and for the expenses of the resale — either disposition being admissible.

MOTION to punish a purchaser at a foreclosure sale for contempt of court.

Wells & Snedeker, for plaintiff.

Gilbert W. Minor, in person (purchaser), opposed.

LEVENTRITT, J. This is a motion to punish a purchaser at a foreclosure sale for contempt of court for failure to comply with an order directing him to complete his purchase. Independently of the merits, the motion must be denied, for the papers are replete with defects.

In the first place the application is made on notice of motion instead of by order to show cause. This alone is fatal. Sandford v. Sandford, 40 Hun, 540; People v. Rice, 26 N. Y. Supp. 345; Code of Civil Procedure, § 2269. The defect is not cured by referring to the order to show cause on which the order directing the completion of the purchase was made, and which was in the alternative why the purchaser should not complete

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or be punished for contempt. That order to show cause was disposed of by the entry of the order granting merely the first part of the relief prayed for. The alternative relief, punishment as for a contempt, was denied, and the purchaser, therefore, is no longer in court on that branch of the order to show cause. Further than that, the present motion papers do not proceed on the former order to show cause, but merely on the order entered thereupon; that order to show cause is consequently not even before the court. The plaintiff moves only on the order directing completion and the affidavit of his attorney to the effect that the purchase was not completed. Another affidavit is referred to in the notice of motion, but it is not annexed to the moving papers and was not submitted to the court. This must be treated as a new proceeding to punish for a contempt for the violation of an order not entered when the previous order to show cause was issued, and as such new proceeding requires a new order to show cause.

Secondly, the moving papers, *i. e.,* the attorney's affidavit and the order directing completion fail to show any facts from which the court can adjudge that a right or remedy of the plaintiff has been defeated, impaired, impeded, or prejudiced. This defect is also fatal. Code of Civil Procedure, § 14; Fischer v. Raab, 81 N. Y. 235; First National Bank v. Fitzpatrick, 80 Hun, 75; Socialistic Co-operative Publishing Association v. Kuhn, 51 App. Div. 583. The previous proceedings in this action cannot be resorted to in order to discover these facts, as they are not recited in the notice as the basis of the motion.

Thirdly, the order directing the purchaser to complete was, according to the affidavit of service of the order annexed to the moving papers, not served until three days after the expiration of the time within which the purchaser was directed to complete.

Upon a re-examination of that order, which was made by me, I am of the opinion that it should not have been entered in the form adopted. By an oversight the purchaser was directed to complete on the same day that the order was signed, which was quite beyond my intention. Deliberation had on this motion satisfies me that that order should be resettled. While there is no doubt of the power of the court to punish for contempt where a purchaser refuses to complete without offering satisfactory explanation for his omission (Burton v. Linn, 21 App. Div. 609), it

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is entirely in the discretion of the court "whether upon such a motion the court will direct the purchaser to complete the sale or direct a resale to be had at the expense of the purchaser." Burton v. Linn, *supra*, 610. And see Rowley v. Feldman, 66 App. Div. 463. The purchaser should of course be held liable for any deficiency on a resale, and if, after the exact amount of the deficiency shall have been fixed by order, he shall then fail to pay it, he can be punished accordingly (Rowley v. Feldman, *supra*) and his inability to pay will be no excuse (Burton v. Linn, *supra*); but he must take the consequences of his reckless bidding.

The present motion is denied, and if the purchaser be so advised, I will entertain a motion for the resettlement, as indicated in this opinion, of the order heretofore entered.

Motion denied.

Matter of the Application of AUGUST BELMONT and WALTER LUTTGEN, Claimants, for a Writ of Certiorari to be Directed to WILLIAM D. LEONARD, Chairman, JAMES R. BURNET and JOHN S. WISE, Jr., Commissioners, Appointed under and by Virtue of the Provisions of Chapter 537 of the Laws of 1893, and Continuing to Act under the Amendments of said Act, being Chapter 567 of the Laws of 1894, and other Acts. And Nineteen other Cases.

(Supreme Court, New York Special Term, February, 1903.)

Certiorari to review a determination — Attorney may verify petition — Parties — Code Civ. Pro., §§ 2127, 2129, 2137.

A petition for a writ of certiorari to review a determination by which a person is aggrieved may be verified by the authorized attorney of the person.

Where the determination has been made by a board appointed in a city under a special statute, the city, although beneficially interested in sustaining the determination, is not a necessary party to the proceeding.

The fact that the city may be brought in under Code Civ. Pro., § 2137, does not make it a necessary party.

MOTION to quash writs of certiorari.

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Joseph F. McLoughlin, for petitioners.

Geo. L. Rives, Corporation Counsel, for respondents.

LEVENTRITT, J. This is an application to quash writs of certiorari in twenty cases.

Two technical defects are urged. First, that the affidavits on the basis of which the writs were allowed are made by the attorney instead of by the respective relators. Secondly, that the city of New York is not made a party defendant. Neither objection has force.

Under section 2127 of the Code: "An application for the writ must be made by, or in behalf of, a person aggrieved by the determination to be reviewed" and "must be founded upon an affidavit, or a verified petition, which may be accompanied by other written proof; and must show a proper case for the issuing of the writ." The "*by or in behalf*" are sufficiently broad to permit verification by a duly authorized attorney. The defendants seek to qualify this language by reference to section 1994, requiring that a State writ must be issued "in behalf of the people of the State." But this has reference to all proceedings, whether they begin, People of the State of New York against named defendants or People of the State of New York on the relation of John Doe against named defendants. Inasmuch as all State writs must be issued in behalf of the People, there is no reason for incorporating the words "in behalf" in section 2127 unless it was intended to give a broader right.

The cases cited by the defendants arose either under chapter 269 of the Laws of 1880, or under section 250 of the present Tax Law. Section 1 of the former act allowed the writ "*on the petition,* duly verified, of any person or corporation assessed and claiming to be aggrieved;" while the latter section says: "any person * * * claiming to be aggrieved * * * may present to the Supreme Court a petition duly verified." In both cases the remedy can by the language of the statutes only be invoked by the petition of the person aggrieved. There is no alternative provision, as in the present Code section, permitting the application by affidavit, or in behalf of the person aggrieved.

When an attorney subscribes to the affidavit, as he has in this case, and verifies it, it is not to be assumed that he did so without

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authority. If lack of authority is claimed, it must be established by proof before the proceeding can be held to be irregular. People ex rel. Adams v. Coleman, 41 Hun, 307.

As to the second objection, I am of the opinion that the city is not a necessary party. The Code requires that the writ must be directed to the body or officer whose determination is to be reviewed, and where it is brought to review, as in this case, the determination of a board or body, other than a court having no official name, it must be directed to the members thereof by their names. Code, § 2129. This has been done. The record has been removed into this court for review in the manner provided by statute. The city, however, being specially and beneficially interested in upholding the application to be reviewed, may, in the discretion of the court, be admitted as a party defendant pursuant to the terms of section 2137 of the Code. But this permissive joinder after the allowance of the writ does not make it a necessary party. See People ex rel. Steward v. Railroad Commissioners, 160 N. Y. 202.

The objections are without merit and the motions to quash are denied, with $10 costs in the case of People ex rel. Belmont.

Motions denied, with $10 costs.

Matter of the Application of SOLOMON SAYLES, for the Remission of the Forfeiture of Bail in an Action, Entitled "PEOPLE OF THE STATE OF NEW YORK AGAINST HENRY L. SAYLES," Pursuant to Sections 597 and 598 of the Code of Criminal Procedure.

(Supreme Court, New York Special Term, February, 1903.)

Crimes — Remission of forfeiture of bail — Statute of Limitations — Practice in New York city — Penal Code, § 597.

No statute limits the time for making a motion for a remission of the forfeiture of an undertaking for bail.

In the city of New York the remission is governed by Penal Code, § 597, which, as it now stands, was passed subsequent to, and is not controlled by, the Consolidation Act (L. 1882, ch. 410, § 1482).

The certificate of the district attorney, described in said section 1482, is not now a prerequisite to such an application.

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Where it appeared, from the moving papers in such a matter, that the prisoner, after giving bail, defaulted in 1886, that he returned to the jurisdiction in 1890, that he again gave bail, that in 1890 the district attorney had the indictment dismissed for lack of evidence and, by the affidavit of an assistant district attorney in office from 1886 to 1889, that the people lost during his term no rights by the escape, the court remitted the forfeiture, which had been directed when the prisoner defaulted.

MOTION for an order directing the remission of the forfeiture of the bail of Henry L. Sayles, furnished by Solomon Sayles, his surety in a certain action in the Court of General Sessions in and for the county of New York, entitled "People of New York against Henry L. Sayles," and that the amount paid in satisfaction of said forfeiture by said Solomon Sayles be paid and returned to him; that if necessary a reference be ordered to take proof of the facts and circumstances stated in the moving papers and for such other and further relief as may be just and proper.

On April 13, 1886, one Henry L. Sayles was duly indicted for the crime of bribery in the Court of General Sessions of the Peace in the county of New York. Thereafter said Henry L. Sayles was held to answer by said court upon the said indictment, and the applicant herein gave a certain bail or undertaking in the sum of $25,000 for the appearance to answer of the said Henry L. Sayles upon the trial. On the failure of said Henry L. Sayles to appear the said court on October 13, 1886, duly ordered the forfeiture of said bail. On said last mentioned day judgment for $25,000 was entered against this applicant, and thereafter the said amount with all costs, charges and expenses was paid by the applicant to the comptroller and chamberlain of the city of New York. Thereafter on May 7, 1890, the said Henry L. Sayles returned to the jurisdiction of the court and voluntarily surrendered himself for trial upon the said indictment. He was again admitted to bail. The said Henry L. Sayles remained within the jurisdiction of the court until June 13, 1890, when, upon the motion of the Hon. John R. Fellows, the then district attorney, upon the ground that there was not and never had been any evidence justifying the indictment or trial of said Henry L. Sayles, said indictment was duly dismissed by the Court of General Sessions. This motion is based upon the alleged facts that between the date of the for-

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feiture of said bail, to wit, on the 13th day of October, 1886, and his surrender on the 7th day of May, 1890, at which time this applicant gave new bail for said Henry L. Sayles, the situation with respect to the indictment and trial of the said defendant remained the same, and that all of the witnesses against him, if any, were still within the jurisdiction of the court and available, and he could have been tried as well at said time and with the same likelihood of conviction, if any, as at the time said bail was forfeited.

The contention of the district attorney and the other essential facts sufficiently appear in the opinion.

Joseph A. Flannery, for Solomon Sayles.

William Travers Jerome, district attorney.

TRUAX, J. If the contention of the district attorney is right a motion of this kind could not be made after a district attorney had retired from office, for how can a district attorney, who was not in office at the time that the recognizance was forfeited, certify that the people of the State of New York have lost no rights by reason of the failure of a surety to produce a principal in compliance with the terms of a recognizance given by him, and that by reason of the principal's being produced the people of the State of New York are in as good a position to prosecute said principal as when said failure occurred? A literal interpretation of the statute, section 1482 of chapter 410 of the Laws of 1882, would imply that the certificate was to be issued only by the district attorney who was in office at the time of the forfeiture of the recognizance, and would not authorize a certificate upon information and belief. It is well settled that there is no statute of limitation barring an application of this kind (People v. Nooney, 64 Hun, 171), and yet, if the contention of the district attorney is correct there would be a statute of limitation which would bar the making of the application after the tenure of office of the person who was district attorney at the time the recognizance was forfeited had expired, for, I take it, that the words "the district attorney" mean the person who was district attorney at the time the recognizance was forfeited, and does not mean some subsequent district attorney. Moreover, the construction given to section 1482 by the district attorney would in effect make the dis-

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trict attorney the sole judge of whether a judgment entered on a forfeited recognizance should or should not be opened because, if he should refuse to give the certificate required by section 1482, if the contention of the learned district attorney is correct, the court could not open the judgment. Such cannot be the law. Sections 597 and 598 of the Code of Criminal Procedure would be rendered nugatory if the contention of the district attorney is correct. Section 597 says that the Supreme Court may remit the forfeiture or any part thereof upon such terms as are just, while all that section 598 requires is that an application for a remission of the forfeiture must be made on at least five days' notice to the district attorney of the county. Now if his certificate is a prerequisite why should he have notice of the application? The district attorney also contends that the above-mentioned sections 597 and 598 are controlled by section 1482 of the Consolidation Act because the latter section was passed later than the former two sections. It is true that said section 1482 was passed subsequently to sections 597 and 598, but section 597 was amended in 1895 (which was subsequent to the passage of said section 1482 of the Consolidation Act) so that it reads as it now reads, and therefore became a law subsequent to the passage of said section 1482 of the Consolidation Act. Goillotel v. Mayor, 87 N. Y. 441.

It now remains to be considered whether the people lost any rights by the escape of the indicted person. The papers show that some time after his escape the indicted person returned to this county and surrendered himself and was again admitted to bail; that some time after such surrender and admission to bail John R. Fellows, who was then district attorney, moved for the dismissal of the indictment, and then stated in open court that there was not and never had been any evidence justifying the indictment or trial of said indicted person, and Mr. Delancy Nicoll who was, in the years 1886, '87 and '88 an assistant district attorney, and who was thoroughly familiar with the matters out of which this indictment grew, makes an affidavit, which is used on this motion, that the people lost no rights during his said term of office by reason of the absence from this jurisdiction of the said indicted person. He further certifies that he verily believes that the people lost no rights prior to the surrender of the indicted person which took place on the 7th day of May, 1890.

Motion granted.

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THE PEOPLE ex rel. TAYLOR STRYKER, Relator, *v.* HENRY VAN BERGEN, Sheriff.

(Supreme Court, Rensselaer Special Term, February, 1903.)

Jurisdiction — Lost by "holding open" a matter — Contempt of an order — Code Civ. Pro., § 2471a.

A county judge who, after having made an order under Code Civ. Pro., § 2471a, requiring a person, appointed to fill an alleged vacancy in an office, to surrender its books and papers to a claimant, by election, of the office, is restrained by the Supreme Court from the further hearing of the proceeding, cannot, without communicating or making any note or entry of his determination, "hold open" the proceeding for twenty-four days and until the restraining order has been vacated and then, without notifying the said appointee, or his counsel, of the resumption of the proceeding, proceed to "inquire into the circumstances", and thereafter, there being no appearance for the appointee or any opposition, commit him to jail until he delivers the said books and papers or is discharged according to law.

The county judge by "holding open" the proceeding, and not adjourning it for a definite time as required by Code Civ. Pro., § 2471a, loses jurisdiction.

It is a fatal defect where neither the order directing commitment nor the commitment describes definitely the books and papers which the appointee is required to deliver.

HABEAS CORPUS proceeding.

Lewis E. Carr, for relator.

Clarence E. Bloodgood, for defendant Churchill.

HOWARD, J. A proceeding was instituted in behalf of Henry D. Churchill before the county judge of Greene county, under section 2471a of the Code of Civil Procedure, to compel Taylor Stryker to deliver to him the books and papers belonging or appertaining to the office of commissioner of highways of the town of Cairo, in said county. The order of the county judge was made returnable on the 24th day of December, 1902. On such return day, before any hearing thereon, the county judge was served

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with an order of the Supreme Court in an action wherein Taylor Stryker was plaintiff and Henry D. Churchill defendant, enjoining and restraining him from the further hearing of such proceeding (39 Misc. Rep. 578). This order was subsequently vacated, and the county judge served with a copy of the order. When the county judge was served with the injunction order restraining him from proceeding with the matter he did not adjourn the proceeding but, to use his own language, "held it open," and continued it until the 17th day of January, 1903, and on that day proceeded to inquire into the circumstances, and there being no appearance on the part of Stryker and no opposition to the motion of Churchill, the county judge made an order committing Stryker to the Greene county jail until he should deliver to Churchill the books and papers belonging or appertaining to the office, or be discharged according to law. It is not claimed that the county judge made any note or entry of his holding the matter open and continuing it, and it must be assumed on this hearing his holding it open and continuing it was in his own mind, and was communicated to no one. Stryker had no notice, actual or otherwise, that the proceeding was to be continued or taken up on the 17th day of January, 1903. A copy of the order of the Supreme Court vacating the injunction order was served upon his attorney by mail, but did not reach him until January 17, 1903, and he first learned of the continuance of that proceeding after a warrant had been issued and his client had been arrested.

Section 2471a of the Code of Civil Procedure provides that: "At such time, or at any time to which the matter *may be adjourned,* on proof of the due service of the order, such justice or judge shall proceed to inquire into the circumstances." The relator claims that he should be discharged from custody by virtue of this writ of habeas corpus because the proceeding, begun on December 24, 1902, was not adjourned to any definite or fixed time, but was only "held open" in the mind of the county judge, that he had no notice whatever of the time or place when that proceeding was to be continued, that he did not have "his day in court" or any opportunity to appear with counsel or otherwise to interpose a defense, and that on account of the failure of the county judge to adjourn the proceeding to a definite time he lost jurisdiction of the proceeding, and therefore he, the relator, is confined illegally. I believe this

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to be a sound and just proposition. Certainly if persons who commit felonies are accorded the right to be present in court at all times and to be confronted by witnesses when they are tried, and to be represented by counsel, and to have the benefit of all reasonable doubt and the presumption of innocence, when the liberty of the citizen is to be interfered with in instances where he is not charged with any crime he should have similar rights. I cannot conceive of any law which will give any court the right to deprive the citizen of his liberty without a fair opportunity to be heard and to take advantage of such rights and privileges as he may think himself entitled to. The Code of Criminal Procedure requires the presence of the defendant at all times during his trial in the case of a felony, and the courts have intimated that in case of his absence without consent during any part of the examination a conviction will be void. If this would invalidate a criminal trial it seems to me the relator's utter ignorance of his peril in this proceeding should invalidate the action of the county judge. It is said by the counsel, who opposes the discharge of the relator, he can procure his release instantly by conforming to the provisions of section 2471a and presenting to the county judge an affidavit that he had delivered to the claimant all books and papers appertaining to the office that were in his custody. That may be true, but he is not called upon to do this. He is now contending before the Appellate Division on his appeal from the order vacating the injunction which restrained the further prosecution of the proceeding before the county judge that such injunction was improperly vacated, and he should not be compelled by force or sharp practice to surrender his attitude before that court. Had he been represented by counsel or had an opportunity to appear before the county judge he might have obtained a stay of proceedings under the order made by the county judge, either from him or the justice vacating the injunction order, until the determination of his appeal by the Appellate Division. At all events, the opportunity would then have been afforded him of applying for such a stay. It is said by the counsel who opposes the discharge of the relator that the county judge did not lose his jurisdiction by "holding open" the hearing, and he quotes definitions and authorities showing that "holding open" means substantially adjourning the matter, and among the quotations he gives a definition found in Blackstone as follows: "An adjournment is no more

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than a continuation of the session from one day to another, as the word itself signifies." But if this definition be adopted, even that was not done by the county judge, because the proceeding was not "held open" from one day to another, but was only "held open" in the mind of the judge without any knowledge on the part of the other person as to when it would be continued, and the result of this method of adjournment, or as the county judge styles it "holding open," resulted in great hardship and jeopardy to the relator. It is to be observed the county judge was not by the injunction order restrained from adjourning the proceeding, either from one day to another or from one time to another, and had he done that Stryker would have had an opportunity to be advised of that fact, and of what would or might be done should the injunction order be vacated. This statute should be strictly and literally construed in a matter of so great importance as this, and where such drastic and extreme measures are to be pursued. The statute ought always to be liberally construed in favor of the person whose liberty has been interfered with, and all doubts should be resolved in his favor. I believe by this system of "holding open" this proceeding, and by his failure to definitely adjourn as provided by statute the county judge lost jurisdiction of the proceeding, and his order made January seventeenth was without jurisdiction, and therefore void.

There was also a failure to definitely describe, either in the order to show cause or in the order directing a commitment to issue, or in the commitment itself, the books and papers which the relator was required to surrender. In the Devlin Case, 5 Abb. Pr. 315, this was held to be insufficient to justify the arrest of the party required to surrender books and papers. Following the reasoning in that case, and for the other reasons already stated, the relator is entitled to be discharged from custody, and an order to that effect should issue.

Relator discharged.

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Misc.] Surrogate's Court, Cattaraugus County, February, 1903.

Matter of the Judicial Settlement of the Estate of WILLIAM WOODBURY, Deceased.

(Surrogate's Court, Cattaraugus County, February, 1903.)

Will — A power of sale exercised of necessity does not convert realty into personalty — Priority of payment of a bequest in lieu of dower and distribution — Interest chargeable to an executor — Unnecessary burial lot and monument — Transaction with a deceased person — Code Civ. Pro., § 829.

Where a lawyer, who drew his own will and thereby gave his executors a discretionary power of sale, devised to one of them, his widow, by the first item, certain real estate absolutely, by the third item gave her in lieu of dower and distribution one-half of his personalty absolutely and the use of the other half for life, except such as was not otherwise disposed of by the will, and then made to others legacies out of the proceeds of the sale of his real estate amounting to nearly the full value thereof, the court considered it unreasonable to hold that the widow was under the third item entitled to any share in the proceeds of the real estate as personalty simply because the real estate had necessarily been converted into personalty in order to pay the legacies charged upon the land.

Under such a devise and bequest to a widow, in lieu of dower and distribution, she is to be deemed a purchaser; and, although her legacy exceeds in value the rights she relinquished, she is entitled, as against the general and residuary legatees, to one-half of the personalty after deducting the debts and expenses of administration.

Where an executor has closed his estate with reasonable diligence and has accounted for all the interest he has received on the fund, he cannot, in the absence of proof of fraud or that he used the moneys for his own purposes to his own profit, be charged with any more interest where there is no affirmative proof that he could have invested the moneys to better advantage.

Where a testator has in his lifetime provided for himself a burial lot and monument, his executrix cannot be allowed the expense of procuring new ones.

Where the surviving executor of the estate of the testator calls and examines an alleged debtor of the testator in order to show the

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liability and surcharge the account of the administrator of the widow, his former coexecutor, with the amount of the debt, the witness, although incompetent to testify to a personal transaction with the testator which would relieve the witness from liability, is entitled to give the whole transaction with the testator and show that he was not indebted to him.

PROCEEDINGS upon the judicial settlement of an executor. Objections to accounts.

Thrasher & Leonard, for executor, Benjamin P. Woodbury.

Walter Record, for administrator of estate of Marjorie J. Woodbury, deceased.

DAVIE, S. The testator died February 12, 1897, leaving him surviving his widow, Marjorie J. Woodbury, and no descendants, and leaving a will dated July 12, 1893, which was admitted to probate March 12, 1897; the widow was named as executrix and Benjamin P. Woodbury as executor, his appointment, however, not to take effect until the death of the executrix; letters testamentary were issued to the widow upon the probate of the will, and she continued in the execution of such trust up to the time of her decease, April 15, 1900, having had no judicial settlement of her accounts. Letters were thereupon issued to Benjamin P. Woodbury, the other executor. Letters of administration on the estate of Marjorie J. Woodbury were issued to Daniel P. Barnard May 16, 1900. The estate of the widow principally consists of her interest under the will of her husband. The executor presents his accounts for judicial settlement, and objections are filed thereto by the administrator of the widow's estate. The administrator also presents an account of her proceedings as such executrix, the same being objected to by the executor Benjamin P. Woodbury. The issues raised by the objections filed to both accounts were by consent tried together. The contest relates entirely to the relative rights of Benjamin P. Woodbury, as a legatee under the will of the testator, and those of the administrator of the estate of the widow, she being also a legatee under the will.

The testator died possessed of personal property consisting mainly of money securities of the value of about thirteen thou-

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sand dollars ($13,000), and seized of real estate of the value of seven thousand five hundred dollars ($7,500).

By the first item of the will an undivided one-third part of testator's residence in the village of Gowanda was devised to the widow absolutely, and the use of the other two-thirds during her life. By the second item of the will the testator bequeathed to his widow one-half of his household furniture, goods, and valuables in the house not otherwise specifically disposed of, absolutely, and the use of the other one-half during her life. The third item is as follows:

"I give and bequeath to my wife one-half of my personal estate in lieu of dower and distribution, and the use of the other one-half during her life, except such as is herein otherwise disposed of."

By the fourth item the testator bequeathed to Benjamin P. Woodbury the sum of $3,000, with interest thereon, six months after the death of the testator, "to be paid soon as it can be out of and by the sale of real estate." By the fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth items bequests are given to various persons, including one of $480 to one brother and $500 to another brother, aggregating in all the sum of $4,420. Then follows this provision:

"The foregoing legacies beginning with the fourth are to be paid from the avails of the sale of real estate soon as they can be without sacrifice, in the order that they are numbered; and in case any remain unpaid at the decease of Mrs. Woodbury, such shall be due and demandable six months thereafter, and none to draw interest until they become payable. And I do further provide that the payment of any of the legacies herein may be made in whole or in part by the executrix turning out and assigning any securities on real estate becoming due within three years after such legacies may be demanded, which are considered good securities: and when the sale of my real estate shall be made, it shall be free from any claim by legatees."

Then follows a bequest of $490 to the Methodist Episcopal church, several specific legacies to various persons, and the residuary clause, as follows:

"All the rest and residue of my estate and property not herein

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disposed of, I give, devise and bequeath to Benjamin P. Woodbury."

The executors are not expressly *directed* to sell the real estate, but they are given the *power* so to do in the following terms: "With full power to sell, transfer and convey any and all of my property real or personal, and do all things necessary to carry out the provisions of this will in settling the estate." The only other provision of the will to which it is necessary to refer in this connection is the following statement in the fifteenth item:

"And I hope she (the widow) will lose no time in making her will, and also dispose of her property when and where it will give her the greatest satisfaction;" and the following statement in the sixteenth item:

"And I hereby confer on him (Benjamin P. Woodbury) and his children all interest, rights and privileges that would vest in him and them if he was my lineal heir; but this is not to affect the provisions of this will. Mrs. Woodbury is to have the use of the real estate until it is sold."

It is claimed on behalf of the representative of the widow's estate that the will by its terms operates as an equitable conversion of the real estate, and that the bequest to the widow in the third item of the will applies not only to the personal estate, but also to the proceeds derived from the sale of the real estate.

It may with considerable force be urged that the will does operate as an equitable conversion of that portion of the realty not specifically devised; while a mere power of sale does not so operate and while the question of equitable conversion is often one of intent (Bisph. Eq. [4th ed.] 374; 3 Pom. Eq. Juris. 127; Am. & Eng. Encyc. of Law [1st ed.] 665), yet an express direction to sell or a power of sale coupled with such testamentary provisions as render it necessary to exercise such power in order to effectuate the testator's intention operates as an equitable conversion. Delafield v. Barlow, 107 N. Y. 535; Savage v. Burnham, 17 id. 561–569; Hatch v. Bassett, 52 id. 359; Fisher v. Banta, 66 id. 468; Greenland v. Waddell, 116 id. 234.

The fact that testator in this case makes bequests to the extent of nearly the full value of his real estate, directing their payment out of the proceeds of the sale of such real estate, coupled with the power of sale on part of the executors should quite likely be held to operate as an equitable conversion, if that question were

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necessarily involved. The important consideration, however, is not the matter of equitable conversion, but is that of the testator's intention as to whether or not he designed that the beneficial provisions of the will in favor of the widow should be limited to his personal estate and the realty specifically devised to her or to extend to his entire estate both real and personal.

The legatee, Benjamin P. Woodbury, was a nephew of the widow, but of no relation by consanguinity to the testator; yet practically the relation of parent and child had always existed between this legatee and the testator, he becoming a member of testator's family in his infancy and assuming his name. It was apparently the design of the testator to divide the bulk of the estate in an equitable manner between the widow and Benjamin P. Woodbury. The testator was a lawyer of ability and extensive experience. He drew his own will while in full possession of his mental faculties. As a lawyer he fully comprehended the technical and legal meaning of the terms "personal property" and "real estate." When, therefore, the testator devised to his widow certain real estate absolutely and bequeathed to her one-half of his personal estate and the use of the other one-half, not otherwise disposed of, for life in lieu of dower and distribution, following such provision by other bequests to be paid from the proceeds of the sale of his real estate to practically the full extent of the value of such real estate, it would be unreasonable and unwarranted to hold that the testator designed that the widow should share in the proceeds of such realty simply because the same as a necessary incident to the payment of the legacies charged thereon was equitably converted. It is entirely apparent that the testator did intend that the widow's interest, aside from the real estate specifically devised to her, should be limited to the personal property possessed by him at the time of his death.

The next question arises, What were the rights of the widow in the personalty under the provisions of this will? The claims of the parties in this regard are widely divergent; the representative of the widow's estate insisting that under the third item of the will he is entitled to the full one-half of such personalty absolutely; on the contrary the accounting executor, in consequence of the provisions of the will to the effect that the payments of any of the legacies might be made by assigning securities on real

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estate, asserts that he was authorized to pay such legacies out of the general corpus of the personal estate, and that the widow was entitled to only one-half of what might remain. He has accordingly paid all such legacies from the personal property.

This bequest to the widow was expressly declared to be in lieu of dower and distribution. Such a bequest is more than a mere gratuity — it is in the nature of a contract to purchase. The widow was required to make an election between her right to be endowed of the lands of her husband and the pecuniary provisions made for her by the will (Rev. Stat., tit. III, § 12; Real Prop. Law, § 180), and having failed within one year after the death of her husband to enter upon the lands to be assigned to her for her dower, or to commence proceedings for the recovery or assignment thereof, she is deemed to have accepted such beneficiary provisions. Rev. Stat., tit. III, § 14; Real Prop. Law, § 181.

The law is well settled that where a legacy is given in consideration of the relinquishment by the legatee of some subsisting right or interest, as to a creditor in satisfaction of a debt or to a wife in lieu of dower, such legacy is entitled to priority over general legacies which are mere bounties, for in such cases the legatee stands in the situation of a purchaser and not a mere volunteer. Williamson v. Williamson, 6 Paige, 298; Matter of Dolan, 4 Redf. 511; Isenhart v. Brown, 1 Edw. Ch. 411; Blower v. Norret, 2 Ves. Ch. 421; 13 Am. & Eng. Encyc. of Law, 136.

Such is the rule, though the value of the legacy greatly exceeds the value of the rights relinquished. Matter of Dolan, *supra;* Heath v. Dendy, 1 Russ. 543; Farnum v. Bascom, 122 Mass. 282; Reed v. Reed, 9 Watts (Penn.), 263; Howard v. Francis, 30 N. J. Eq. 444; Warren v. Morris, 4 Del. Ch. 289.

In the opinion in the case of Williamson v. Williamson, above cited, the chancellor says: "Indeed, a legacy to the widow in lieu of dower is viewed in a more favorable light than a legacy to a child, the widow taking the bequest as an equivalent for her relinquishment of a right, and the child taking it as a mere bounty of the testator. For this reason the legacy of the wife given in lieu of dower does not abate ratably with others, if the fund is insufficient to satisfy all."

In the case of Isenhart v. Brown, above cited, the vice-chancellor says: "The legacies given to her by this will are partly specific and partly pecuniary; and they constitute the provision

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made for her by the testator in lieu of her right of dower in his estate. It is the price put by the testator himself upon that right, and which she is at liberty to accept. Her relinquishment of dower forms a valuable consideration for the testamentary gifts. In this point of view she becomes a purchaser of the property left to her by the will. So, on the other hand, the husband offers a price for his wife's legal right of dower which he proposes to extinguish; and if she agrees to the terms, she relinquishes it and is entitled to the price. It is, therefore, a matter of convention or contract between them; and what she thus becomes entitled to receive, is not by way of bounty, like other general bequests: but as purchase money for what she relinquishes and which, consequently, must be paid in preference to other legacies — they being merely voluntary. This doctrine is very clearly stated in the 1st volume of Roper on Legacies, 297; and it is a doctrine well supported by judicial authority."

Reference to these authorities clearly shows that it is the policy of the law to scrupulously guard a bequest to a widow in lieu of dower against diminution so long as there may be funds of the estate out of which the same may be paid. The fact that in this case the testator has given the widow the use of all of his real estate until the same might be sold does not change the situation. For having accepted the pecuniary provisions under the will she absolutely loses her dower interest in all of her husband's real estate, and such real estate becomes liable for the payment of the legacies charged upon it free from any claim upon her part.

The vice-chancellor, in the Isenhart case, after reviewing the English decisions bearing upon the question, says: "Considering all these cases, I am bound to regard the law as settled that, under circumstances like the present, a widow is entitled, after payment of the debts, to the whole provision which the husband chooses to make for her by his will, in lieu of dower, in preference to all other legatees, who are consequently to be postponed where there is a deficiency of assets. Of course the debts must be paid before she can be entitled even to specific legacies; but these debts may be paid out of other parts of the estate, in exoneration of what is specifically bequeathed or devised."

These decisions lead to the conclusion that the widow became entitled, under the will of the testator, to the full one-half of the personal estate owned by the testator at the time of his death, after payment of debts and expenses of administration.

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The executor, Benjamin P. Woodbury, in the account filed by him does not charge himself with any interest derived from the personal estate which came into his hands, and none of the objections made to his accounts relate to this omission. It was conceded on the trial that the amount which the executor had actually received as interest during his administration of the estate was the sum of $309.30, and that his account should be surcharged to that extent. The administrator of the widow's estate contends that a larger amount should have been received by proper management of the funds of the estate, and that the executor should be charged with a greater sum for interest.

While the liability of an executor for interest must depend largely upon the particular circumstances of each individual case, yet there are certain well-defined principles applicable thereto. The rule is elementary that all profits derived directly or indirectly from the assets of the estate, either spontaneously or through the act of the representative, will be charged against him in the final settlement of the estate. 7 Am. & Eng. Encyc. of Law, 426.

In the case of Dunscomb v. Dunscomb, 1 Johns. Ch. 508, it was said: "The rule is settled that executors and all other trustees are chargeable with interest if they have made use of the money themselves, or have been negligent, either in not paying over the money or in not loaning or investing it so as to render it productive." This rule has been followed in a long line of well-considered cases. Brown v. Rickets, 4 Johns. Ch. 303; Manning v. Manning, 1 id. 533; Schieffelin v. Stewart, id. 620; Mumford v. Murray, 6 id. 1; Kellett v. Rathbun, 4 Paige, 102.

In the case of Price v. Holman, 135 N. Y. 133, it is said: "The law exacts of a trustee fidelity to his trust. If he is guilty of a fraud or the mismanagement of the trust fund, or is guilty of a breach of trust, or has used the trust funds for his own purposes and made a profit therefrom, he may be compelled to pay interest."

The personal estate coming into the hands of this executor consisted principally of money securities and cash on deposit in two different banks. Soon after his appointment he began making payments upon the debts of the testator and upon the bequests provided for in his will. The amount above specified as interest covers all interest actually received by him. He can be

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charged with no further sum except upon the theory that he has been guilty of negligence in not investing the moneys of the estate in such a manner as to be more productive. No evidence is produced to justify a finding of negligence of this character. Directly after his appointment he began closing the affairs of the estate, and so far as it is made to appear proceeded with reasonable diligence up to the time of the filing of his petition for a judicial settlement herein. An application of the principles enunciated in the decisions above cited will not justify any greater charge of interest against this executor than the amount above stated.

The other objections filed to the executor's account are disposed of by the findings herewith submitted, and need not be more particularly referred to herein. There are two items in the account of the administrator of the proceedings of the widow, as executrix, which are objected to. They are: "Monument $714.00," "Lot, Cemetery $80.00." The circumstances upon which such objections are predicated are substantially these:

After the death of the testator his widow, the executrix, purchased a lot in the cemetery in the village of Gowanda, paying therefor the sum of $80, and taking a deed for the same in her own name and in the name of Benjamin P. Woodbury. The testator was buried in this lot. The executrix also caused a monument to be erected thereon at an expense of $714. Many years ago David Woodbury, the father of the testator, acquired title from the Cemetery Association to a burial lot in the village of Silver Creek, N. Y. About fifteen years ago this cemetery association became incorporated and began giving deeds. In March, 1897, the association made a deed of this lot in terms to David Woodbury and his heirs, although at that time David Woodbury, as well as his son, the testator, were both deceased. At the time of the death of the testator there was sufficient room upon this lot for two or more graves. The testator's father and mother were buried there, as well as various other near relatives of the testator. Sometime before his decease the testator purchased a monument of some considerable size and had the same erected upon this lot, having his own name placed thereon, as well as that of the father and mother and the other relatives buried there. It is entirely apparent that the testator designed, at the time of the erection of this monument, to make this lot his burial place, and

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there is no evidence indicating any change of such intention down to the time of his death. In other words, he had made ample provision prior to his death for such a monument as he desired and for a place of burial. No objection is made to the fact that the widow saw fit to procure a lot in the village of Gowanda and to have the remains of her husband buried at that place; but, under the circumstances referred to, she was not justified in paying the expense of the same out of the funds of the estate.

It would have been the duty of the executrix to have given proper burial to the testator and to have erected a suitable monument at his grave had he not himself during his lifetime provided for the same. Necessary and reasonable funeral expenses are a charge upon the estate and have a preference over all debts against it, and the law implies a promise on the part of the executor to pay the one who, in the absence of or neglect of the executor, incurs or pays such expense. Patterson v. Patterson, 59 N. Y. 574.

Such duty is analogous to the obligation of a father to furnish necessaries to a child, and of a husband to a wife, from which the law implies a promise to pay him who does what the father or the husband, in that respect, omits. Jessup Surr. Pr. 936.

This rule, however, is modified where a person unnecessarily interferes or gives directions as to expenditures of interment. Quin v. Hill, 4 Dem. 69; Rappelyea v. Russell, 1 Daly, 214.

The testator was a man comparatively economical and methodical in his business affairs; he had carefully arranged all the details for his burial and his final resting place; it was entirely natural that he should have desired his burial by the side of his father and mother, and his wishes in this particular could have been carried out without expense to the estate. The two items objected to should be disallowed.

The accounting executor also objects to the administrator's account as follows: "Schedule A of said account should be surcharged with the sum of $140.00 owing to said testator at the time of his decease by Daniel P. Barnard, the same being a valid legal claim against a solvent debtor and which, as a part of the assets of said estate, came to the hands of said Marjorie J. Woodbury as such executrix."

For the purpose of maintaining this objection the executor called and examined the alleged debtor, Mr. Barnard. Such ex-

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amination disclosed the fact that the testator, during several years immediately preceding his death, had rendered legal services for Barnard amounting to the sum of $140; Barnard was interrogated particularly in regard to the nature of these services and the circumstances under which the same were rendered. He testified that the actual disbursements incurred by the testator in connection with such services had been paid by him, but that he had not paid for the services themselves. This evidence was sufficient, if unexplained, to establish an absolute liability against Barnard; for, while the evidence did not disclose any express promise on the part of Barnard to pay, yet the law will presume, from the fact of the rendition of such services, a promise on Barnard's part to pay what the same were reasonably worth. Barnard was then asked by his own counsel to explain the arrangement between himself and the testator in regard to compensation for such services; this evidence was objected to on the grounds that the witness was incompetent, under section 829 of the Code; the evidence, however, was taken conditionally by consent, to be retained or subsequently stricken out with the proper exception. Barnard testified, in substance, that the services so rendered by the testator were in connection with the prosecution of doubtful claims, and that testator told him, at the time of his employment, that Barnard must pay the disbursements, and in case testator succeeded in making collection he should also pay for the services, otherwise he should not, and that nothing was collected on any of these demands.

Barnard would have been an incompetent witness, under section 829 of the Code, to have testified in the first instance to any personal transaction with the testator for the purpose of relieving himself from liability for these services; but, when called by the adverse party, and examined to a sufficient extent regarding these transactions to establish liability against him, he was relieved from such incompetency and thereby enabled to explain the entire transaction, although such explanation involved the detailing of personal transactions between himself and the testator. Nay v. Curley, 113 N. Y. 575; Merritt v. Campbell, 79 id. 625.

The court, in the opinion in the case of Nay v. Curley, speaking of the evidence in controversy, says: "It was evidence directly within the prohibition of section 829, and did not fall within the exception in that section, since the plaintiffs had not been exam-

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ined concerning that transaction, in their own behalf or otherwise. There was no error, therefore, in excluding the question put to the defendant, if its admissibility is to be determined by section 829. But that section was not intended to abrogate the principle in the law of evidence that where a party calls a witness and examines him as to a particular part of a communication or transaction, the other party may call out the whole of the communication or transaction bearing upon or tending to explain or qualify the particular part to which the examination of the other party was directed. This rule does not need the sanction of authority. It is founded upon obvious equity and justice. A part of the truth often implies a falsehood, and in the search for truth through the examination of witnesses, courts do not countenance partial statements of facts by witnesses. The principle adverted to is just as applicable in reason to a case where a party calls an adverse party and examines him as to one fact or phase of a transaction in his favor, and then discontinues the inquiry, as in any other. The party examined by the other may, at his own instance, complete the narration for the purpose of explaining, modifying or putting in a different light the particular part to which the examination by the adverse party was restricted. Section 829 in no manner affects the application of the rule. If a party calls the adverse party and examines him as to a personal communication or transaction with a deceased person, in reference to which he would be precluded from testifying in his own behalf under that section, the witness is entitled to state the whole transaction or conversation and thereby explain or qualify the testimony called out by the other party."

The other issues raised by the objections filed are disposed of with sufficient certainty in the findings submitted and need no further discussion in this connection.

Decreed accordingly.

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Misc.] Surrogate's Court, New York County, February, 1903.

Matter of the Transfer Tax upon the Estate of JANE H. WOOD, Deceased.

(Surrogate's Court, New York County, February, 1903.)

Transfer tax — Law phrases unnecessary to create a bequest — Notice to grantee of the proposed taxation of his grant because conveyed to him in contemplation of his grantor's death.

A statement in the will of a decedent directing his executor to "withdraw" one-half of the claims the decedent has presented to his brother's executrix, and further declaring that he "forgives" that half, amounts to a bequest of that half, does not relieve any part of the whole sum from taxation, but has the effect of making the tax on that half assessable to the executrix as such and not to her as an individual.

A claim by the State that real property, alleged to have been conveyed by a decedent "in contemplation of death", has escaped taxation cannot be heard unless and until the grantee has had notice of the proceeding to tax it.

APPEAL from an order assessing and fixing the transfer tax.

Henry H. Bowman and Joseph P. Nolan, for appellants and respondent executor.

Edward H. Fallows, for State Comptroller.

THOMAS, S. The first clause of the decedent's will is, in part, as follows: "I hereby direct my executor hereinafter named to withdraw one-half of each of the claims and demands which have been presented by me, or on my behalf, to the executrix of the will of my deceased brother, Benjamin Wise, and not to collect any more than one-half of the same from said executrix, and I hereby forgive one-half of said claims and demands against my said brother's estate."

The claims referred to were two promissory notes made by the said brother, and the above provision must be regarded as a bequest. To constitute a bequest it is not essential that a testator use the word "give" or the word "bequeath," or any word of

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similar significance. Matter of Thompson, 5 Dem. 393. A bequest of a promissory note to its maker has been held to be a transfer taxable at its fair market value (Morgan v. Warner, 45 App. Div. 424; affd., 162 N. Y. 612), and a bequest of one-half the amount of a note held by a testator has been held a specific legacy of such one-half. Davis v. Crandall, 101 N. Y. 311.

The contention that the decedent did not deem herself entitled to more than fifty per cent. of the amount of the claims she had presented is untenable. The expression "I forgive," etc., in the extract from her will above quoted, negatives that view; and if, by reason of the existence of a counterclaim or other defense, the claims were not enforcible in their entirety, it was for the appellants to show this upon the appraisal. The burden was also upon them to show that the fair market value of the one-half of such claims was not one-half of the face value of the notes, with interest. This was peculiarly so, in view of the fact that the executor had collected that sum for the other one-half.

The assessment of the tax, however, against Adelia Wise individually was erroneous. By virtue of the will of the decedent the property passed to Adelia Wise as executrix of her deceased husband, Benjamin Wise, and the fact that she was, by his will, entitled to the possession and income of his whole estate for life, with the right to resort to the principal, if necessary, for her support, did not justify the assessment of the tax against her individually. The order will be modified by assessing it against Adelia Wise as executrix of the will of Benjamin Wise, deceased, and, as so modified, affirmed. Submit order on notice.

The appeal by the State Comptroller from so much of the order as omitted to assess a tax upon the value of real property alleged to have been conveyed by the decedent, "in contemplation of death," presents an interesting question, which should not be passed upon without notice to the grantee of that property, who is not shown to have had any notice of the proceeding, and against whom the tax must be assessed, if at all. The matter will be remitted to the appraiser for further proceeding, and report as to the taxability of the transfer of this real property. A separate order will be made on this appeal.

Order modified and as modified affirmed. Appeal by State Comptroller remitted to appraiser.

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Matter of the Estate of TRACY W. CONGER, Deceased.

(Surrogate's Court, Oneida County, February, 1903.)

Remainder — Vesting — Suspension of the power of alienation — Second life estate indeterminable as to identity until the lapse of an intermediate life.

A testator gave the use for life, of certain shares of stock, to his wife and to his married daughter equally and to the survivor of them. He further provided that if his son-in-law survived both he should have for life the use of the stock and the use of the homestead, "to be thereafter disposed of as herein provided". After the death of all he gave the shares of stock to certain persons and corporations. The widow has died.

Held, that the remainder in the shares of stock vested at the testator's death, subject only to the life estates.

That there was no suspension of the power of alienation for more than two lives in being.

That the widow having died, the daughter was entitled to the income of all the stock; that at her death that one-half of the principal, whose income the widow had enjoyed, would go to the remaindermen, while the son-in-law would have for life the income of the other half.

That the facts that it could not be determined, until one life had elapsed, in which one-half the son-in-law would have an interest, or as to which half his would be a third life estate, did not prejudice his right to income.

PROCEEDING for judicial settlement of the accounts of executors.

C. M. Wickwire (Joseph Mason, of counsel), for executors and Cordelia C. Eastman.

S. M. Lindsley, for Masonic Home and for Trustees of Masonic Home, located at Utica, N. Y.

C. Lansing Jones, for Home for Aged Men.

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Irving H. Palmer, for Frankie Locke Jones, Alice Locke and Floy Locke.

John H. Murray, for Herman B. Conger and Alice Conger Ellsworth.

CALDER, S. This proceeding was commenced for the judicial settlement of the accounts of the executors herein in which there was involved the construction of the will of decedent as to the disposition of 200 shares of the capital stock of The Utica, Chenango & Susquehanna Valley Railroad Company.

It was insisted that the executors were precluded from contesting the validity of any of the provisions of said will by reason of having accepted the benefits of its terms, but it is deemed preferable to dispose of the issues upon their merits rather than upon the question whether or not the acts of the executors operated as an estoppel which prevented their raising the question under consideration. Tracy W. Conger died February 17, 1899.

He appointed his widow, Susan Conger, his daughter, Cordelia C. Eastman, and his son-in-law, Almon R. Eastman, his executors. Susan Conger died on or about February 20, 1900. Cordelia C. Eastman and Almon R. Eastman survive. They have no children. The portions of said will pertinent to this controversy are:

"*Third.* I give, devise and bequeath unto my said wife, Susan Conger, and my said daughter, Cordelia Eastman, and to the survivor of them, the use for and during the period of their natural lives of two hundred shares of the stock of The Utica, Chenango and Susquehanna Valley Railroad Company now owned by me and I order and direct that such number of shares of said stock be kept by my said executors and the income or interest thereof be annually paid equally to my said wife and daughter during their joint lives and the whole of said income to the survivor during her natural life after the death of either.

"And in case said Almon R. Eastman shall survive both my said wife and daughter, I give, devise and bequeath the use, occupation, interest and income of my said homestead and of said stock of said Utica, Chenango and Susquehanna Valley Railroad Co., to said Eastman after the death of my said wife and daughter for and during the period of his natural life and to be thereafter disposed of as herein provided."

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From the fifth to the fourteenth clause, inclusive, excepting the sixth, which is the residuary clause, testator, "after the death of my said wife and my said daughter and of said Almon R. Eastman" gave, devised and bequeathed said 200 shares as follows:

By the fifth clause, five shares to the Waterville Cemetery Association.

By the seventh, forty shares to the Waterville Union School and Academy.

By the eighth, twenty-five shares to the Masonic Home of Free and Accepted Masons of Utica, N. Y.

By the ninth, twenty shares to the Home for Aged Men of Utica, N. Y.

By the tenth, thirty shares to Frankie Locke (now Jones), Alice Locke and Floy Locke.

By the eleventh, thirty shares to the two children of testator's brother, Abel Conger.

By the twelfth, twenty shares to the two daughters of Jeremiah and Sarah Ann Dye.

By the thirteenth, fifteen shares to Morris B. Field and by the fourteenth, fifteen shares to Myron Field.

His said widow and daughter are the residuary legatees.

It is claimed on the part of the executors and the residuary legatee, Cordelia C. Eastman, that said third provision suspends the absolute ownership of said two hundred shares of stock for a longer period than during the continuance and until the termination of more than two lives in being, at the death of the testator, viz., during the lives of Susan Conger, Cordelia C. Eastman and Almon R. Eastman.

The courts in all cases endeavor to ascertain the true intent of the testator and to carry out that intention if it can be done without violating any principles of construction or provisions of the statute.

Section 33, chapter 547 of the Laws of 1896, said chapter being known as the Real Property Law, is as follows: "Successive estates for life shall not be limited, except to persons in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto, shall be void, and on the death of those persons, the remainder shall

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take effect, in the same manner as if no other life estates had been created."

Chapter 417 of the Laws of 1897, known as the Personal Property Law, section 2, is as follows: "The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a will, for not more than two lives in being at the death of the testator; in other respects limitations of future or contingent interests in personal property, are subject to the rules prescribed in relation to future estates in real property."

It will be seen, therefore, that if said 200 shares of stock vested at testator's death or should vest at the termination of two life estates so that the persons entitled to the remainder were fixed and certain at that time, then any life estate in excess of those allowed by the statute must necessarily be eliminated, and said property at the expiration of two life estates should then be delivered to those who, as remaindermen, are entitled to the same.

It is well settled that where property can be held as vesting, courts will so hold rather than to postpone the same or render it contingent upon the happening of some event, where such vesting is consistent with the intent of the testator.

The fact that Eastman's enjoyment of any part of said stock depends upon his surviving said wife and daughter, and that after his death said entire stock should be "thereafter disposed" of as therein provided does not affect the rights of the remaindermen.

The adverb "thereafter" does not postpone the vesting but refers to the time of enjoyment of those beneficially interested.

The duties imposed upon the executors did not create a trust which placed any limitation upon the bequests so that it would be impossible to determine who were the remaindermen at the expiration of any of the life estates therein created. They were the duties which often fall to persons in a representative capacity in the administration of estates. They were not to sell or reinvest or to do any acts from which it could be inferred that it was the testator's intent to create a trust which should suspend the vesting of any or all of said property until after the termination of the lives of the three persons mentioned.

Futurity was not annexed to the substance of the gift but it re-

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lated simply to the time when the remaindermen should enjoy the bounty of the testator. The statute is violated where the vesting is postponed until the termination of three or more life estates or where at the expiration of two life estates the remaindermen are not in existence or cannot be determined. No such conditions, in my judgment, prevail here. Said stock vested in said remaindermen at testator's death, subject only to said life estates therein created.

The income of all of said stock was given to the wife and daughter as tenants in common to be paid "equally" to them, for the statute expressly states it should be of such character unless declared to be a joint tenancy, and after the death of either, the whole should be enjoyed by the survivor.

The testator intended that his son-in-law should receive some bounty from this stock, provided he outlived the others, and the conclusion here arrived at carries out that intent without violating any provisions of the statute.

The widow having died the daughter is entitled to the income from all of said stock, and one-half of the principal which the widow enjoyed should go absolutely after the death of the daughter to the remaindermen mentioned in said subdivisions of said will in proportion to their respective rights and interests. Two lives would then have expired as to said one-half; as to the other, at the death of said daughter one life only would be spent which would leave the income of said one-half free to be expended for the benefit of Almon R. Eastman, the son-in-law, provided he outlived said daughter, and at his death two life estates only would have expired in said remaining portion and it should then be distributed. In case he does not survive testator's daughter, then at her death all of said stock must be delivered to the remaindermen.

Said Almon R. Eastman had no interest in the portion which the widow enjoyed. As to that his would be the third life estate, and within the subdivisions of the statutes, above referred to, his life estate must be eliminated as to that portion, but as the property vested at the death of the testator it had no effect upon the ultimate disposition of the same.

The fact that it could not be determined until one life had elapsed in which one-half said Eastman had an interest or as to

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which half his would be a third life estate is immaterial. Purdy v. Hayt, 92 N. Y. 457.

The cases cited by the learned counsel for executors have been carefully examined and they no doubt decide questions there presented and apply the proper legal construction to the phraseology there employed. Each case, however, must depend somewhat upon its own words and the construction here given to the language used by the testator carries out, I believe, his true intent.

Findings in accordance with the foregoing should, therefore, be presented and a proper decree thereupon entered.

Decreed accordingly.

GERTRUDE L. MOORE, Plaintiff, *v.* HENRY G. MOORE, Defendant.

(City Court of New York, Trial Term, February, 1903.)

Divorce — Past-due foreign alimony collectible in this State.

A decree, rendered in a court of a sister State, having jurisdiction, made after personal service upon a husband of copies of the subpœna, libel and notice to appear or answer, divorcing the parties and requiring him to pay his wife alimony in certain sums at certain periods, has the effect of establishing in her favor in the State of New York a judicial debt of record which the Constitution of the United States requires our courts to recognize and which entitles her to recover at law in them past-due and unpaid installments of alimony.

ACTION to recover instalments of alimony under a foreign decree of divorce. Tried before the court without a jury.

Emanuel M. Friend, for plaintiff.

Howe & Hummel, for defendant.

DELEHANTY, J. The action is to recover instalments of alimony claimed to be due under a decree of divorce rendered in favor of plaintiff and against defendant by the Court of Common Pleas, Number Three, for the county of Philadelphia, in

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the State of Pennsylvania. It is conceded that defendant was duly and personally served in the city of Philadelphia with a true and attested copy of the subpœna in divorce, together with a copy of the libel and notice to appear and answer in that action, and that the court had jurisdiction to act in the premises. Such being the case the decree itself, under the full faith and credit clause of the Federal Constitution, must be accepted by any tribunal in the land. But defendant contends that such decree will not be enforced by the courts of this State, unless it appears that it has been docketed as a judgment in the State in which it was rendered. While the record contains no proof that the decree in question has been so docketed in the State of Pennsylvania, as a matter of fact, it has been, as appears by an exemplified copy of the "Judgment Index" and of the docket entries received and submitted since the trial hereof. Were doubt entertained as to the right of plaintiff to recover on the decree itself, permission would be granted to reopen the case for the purpose of reading those papers in evidence. But this, in my opinion, is unnecessary in view of the Special Term decision in Wood v. Wood, 7 Misc. Rep. 579, the opinion in which was fully approved in Lynde v. Lynde, 41 App. Div. 280, and by the Court of Appeals in the same case reported in 162 N. Y. 405, 412. The Wood case was instituted for equitable relief to aid in enforcing an alimony decree rendered by a French court, and Pryor, J., held therein that equitable relief by way of sequestration, injunction or security for future alimony would not be afforded by our courts, but that alimony which had become due at the time of the commencement of the action could be recovered in an action at law. That is just what the plaintiff in the case at bar seeks to do. The Pennsylvania decree in suit directed the payment by defendant to plaintiff of certain sums at stated periods by way of alimony, and the force and effect thereof was to make it a judicial debt of record, which the former was entitled to have enforced by the courts of this State under the provisions of the United States Constitution above referred to. Lynde v. Lynde, *supra*. The authorities cited by defendant are in nowise contrary to this doctrine. The Wetmore case, 149 N. Y. 520, so strongly relied upon by defendant in support of his contention, distinctly holds that when the judgment of a sister State fixes the amount of alimony in a divorce case, the duty of the defendant is thus determined. From

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that time on he is in effect a debtor owing his wife the amount adjudged and determined by the decree. And this conforms to the general laws of the Commonwealth of Pennsylvania. See the act of April 15, 1845, which provides "that upon a decree *a mensa et thoro*, and the allowance of alimony shall have been made by any of the courts of Common Pleas of the respective counties of this Commonwealth * * * , it shall be the duty of the prothonotary of said court to enter the said decree on the judgment docket of said court, which said decree when so entered is hereby declared to be and shall remain a lien on the real estate of said respondent, until the same is satisfied for the full amount that may be due up to the period of such satisfaction; and after such lien shall be so entered it shall be the duty of the prothonotary of said court, upon affidavit by the libelant that any payment under said decree * * * is due and unpaid, to issue execution on a written order of the libelant, or her attorney, setting forth the amount so due and unpaid, which shall be directed to and served by the sheriff in like manner as executions upon judgment." In the absence of anything to the contrary this court will assume that the formalities of the statute have been complied with and that the decree in question has been duly docketed as a judgment in accordance therewith. But, in my opinion, it is unnecessary to go this far. In view of the authorities cited the decree itself creates a debt of a fixed and ascertained amount, the collection of which is sought in this action, which, under the authorities cited, is maintainable. It follows, therefore, that plaintiff should have judgment against defendant in the aggregate sum of $1,999.98, with interest on the respective instalments from the date when due, together with an extra allowance of five per cent., and the costs of this action. Defendant to have a stay of ten days after service of judgment hereon with notice of entry thereof, and an additional thirty days' stay to make a case and exceptions on appeal. Submit findings in accordance with foregoing.

Ordered accordingly.

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WILLIAM H. HARRINGTON, Jr., Appellant, *v.* THE CITY OF NEW YORK, Respondent.

(Supreme Court, Appellate Term, March, 1903.)

Municipal Court of the city of New York — Its jurisdiction does not extend to an action on a quasi contract — Voluntary payment made under a mistake of law not recoverable — Duress.

The jurisdiction conferred upon the Municipal Court of the city of New York by its charter (L. 1901, ch. 466, § 1364, subd. 1) and thereby confined to an action for breach of contract, express or "implied," does not give that court jurisdiction of an action to recover of the city a fine imposed upon the plaintiff by a city magistrate who had no jurisdiction to impose the fine. (Per Greenbaum and Freedman, JJ.)

If such an action is maintainable it must be upon the theory of a *quasi* contract and of such an action that court has no jurisdiction and takes none under the word "implied." (Per Greenbaum and Freedman, JJ.)

A voluntary payment of a fine made under a mistake of law cannot be recovered. General allegations of duress are insufficient where there is no allegation or proof of facts constituting duress. (Per Clarke and Freedman, JJ.)

APPEAL from a judgment of the Municipal Court of the city of New York, eleventh district, borough of Manhattan, in favor of defendant sustaining a demurrer to the complaint.

John F. Harrington, for appellant.

George L. Rives, Corporation Counsel (Arthur F. Cosby, of counsel), for respondent.

CLARKE, J. The complaint alleged that defendant is a municipal corporation; that plaintiff on the 7th day of April, 1902, paid to the clerk of the City Magistrates' Court, first division, fourth district, the sum of fifteen dollars, which sum has been paid over and received by the city; that said sum was paid by reason of a fine imposed upon plaintiff by a city magistrate for

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alleged operating an automobile through the streets of New York at a higher rate of speed than eight miles an hour; that said payment was made under coercion of law, threats and duress and the requirement of such payment was without authority of law and the city magistrate acted beyond his power and jurisdiction in assuming to impose such fine and his act in that regard was void. The complaint also properly alleges presentation of the claim to the comptroller and neglect and refusal to make payment of the same. Defendant raises the point that the Municipal Court has no jurisdiction of this cause of action. Section 1364, subdivision 1 of the Greater New York charter confers upon the Municipal Court jurisdiction to entertain "an action to recover damages upon or for breach of contract, express or implied, other than a promise to marry, where the sum claimed does not exceed five hundred dollars." It has been held that the jurisdiction thereby conferred includes an action upon an implied promise to pay money had and received for the use of the plaintiff. Dechen v. Dechen, 59 App. Div. 166. The action in that case, as in this, rested upon an obligation to repay imposed by law irrespective of the purpose of the parties. Such an action is not in strict reasoning to recover damages for breach of an implied contract, but under the above decision the term "implied contract" is held to include actions based upon facts constituting a *quasi* contract, or legal obligation imposed notwithstanding the absence of intention by the defendant to assume the obligation.

The defendant also demurs to the complaint as not stating facts sufficient to constitute a cause of action. The principle of law upon which the plaintiff bases his case is that the payment was procured by duress. It is urged that the court which imposed the fine had no jurisdiction to pass judgment upon the offense charged, and that, as the fine was paid pursuant to such judgment, the law imposes upon the defendant an obligation in the nature of a contract to return the money so paid by the plaintiff. Chapter 266 of the Laws of 1902, passed March 27, 1902, and by its terms taking effect immediately, amended section 666 of the Penal Code and provided that "A person * * * who drives or operates an automobile or motor vehicle, * * * upon any * * * public highway within any city * * * at a greater rate of speed than eight miles per hour * * * is guilty of a misdemeanor, and shall be fined for the first offense

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not exceeding the sum of fifty dollars, and for the second offense not exceeding fifty dollars, or by imprisonment for a term not exceeding six months, or both." The offense then, for which the fine was imposed, was a misdemeanor. But the city magistrates have no jurisdiction to try such an offense. Greater New York charter, § 1409; Kolzem v. Broadway & Seventh Ave. R. Co., 1 Misc. Rep. 148; People v. Patterson, 38 id. 79. Therefore the court having no jurisdiction to try the offense, its judgment is void, and may be questioned either directly or collaterally. Judge Bartlett says, in Beardslee v. Dolge, 143 N. Y. 165, "Where there is a want of authority to hear and determine the subject-matter of the controversy an adjudication upon the merits is a nullity, and does not estop even an assenting party." A collateral "attack can be made upon any judgment where there is no jurisdiction." Ferguson v. Crawford, 70 N. Y. 253; Risley v. Phenix Bank, 83 id. 337; O'Donoghue v. Boies, 159 id. 98. As the city magistrate had no jurisdiction to try the offense and impose the fine, the plaintiff might have appealed to the Court of General Sessions or he might have moved to vacate and for an order requiring the sum paid to be returned. He did neither. He paid the fine and commenced this suit in the Municipal Court to recover it, claiming that the payment was procured by coercion. It, therefore, becomes necessary to further determine whether the complaint sets forth that the payment was made under duress. It is clear that the allegation "that said payment was made under coercion of law, threats and duress and the requirement of such payment was without authority of law" does not state facts which constitute duress, but merely avers conclusions of law. The complaint must state facts from which the court may determine that payment was compulsory. Commercial Bank of Rochester v. City of Rochester, 41 Barb. 341; affd., 41 N. Y. 619. The only allegation of fact as to duress in this complaint is, "that said sum was paid as aforesaid by reason of a fine imposed upon plaintiff by a city magistrate." The plaintiff relies upon Merkee v. City of Rochester, 13 Hun, 157. That was an action to recover money alleged to have been wrongfully extorted from the plaintiff, for the benefit of the city by a police justice. In that case, as in this, the magistrate exceeded his jurisdiction, but it there appears that a penalty of fifty dollars was imposed and in default of payment the defendant was to be imprisoned for ninety days.

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In other words, there was a choice of making the payment or going to jail. That was a clear case of payment under duress in fact. In the case at bar it is not alleged that the plaintiff was under arrest or that there was any direction for his imprisonment in case the fine were not paid. The mere allegation that payment was made because of a fine imposed does not allege duress in fact. Under section 666 of the Penal Code a fine alone may be imposed. It may be suggested that there seems to be no way of enforcing the payment of a fine imposed in a criminal case other than by imprisonment. People ex rel. Gately v. Sage, 13 App. Div. 135. It is not, however, alleged that any attempt was made to enforce the payment. Unless it appears from the facts stated that the plaintiff made an involuntary payment a cause of action based upon duress in fact has not been alleged, even though it may be inferred that there are means of coercion which might have been employed. The force or threat must have induced the payment. Dunham v. Griswold, 100 N. Y. 224. Even were the plaintiff actually under unlawful arrest at the time the payment was made, it would be necessary to allege that the payment was procured by reason of such detention. In Bailey v. Town of Paullina, 69 Iowa, 463, the plaintiff was arrested for the violation of a void ordinance, pleaded guilty, but made no objection to the ordinance, was found guilty and fined, and paid the fine while under arrest without protest, believing that the judgment against him therefor was valid. It was held that he did not pay under duress and could not recover the money so paid. In the complaint before us it is nowhere alleged that the payment was made to avoid detention or imprisonment or because of fear of imprisonment, which constrained or influenced the defendant to make such payment. There is not even an allegation of objection or protest. The complaint merely alleged that the fine was imposed and paid. The plaintiff has since learned that the magistrate had no authority under the statute to impose the fine. A fine cannot be recovered which is voluntarily paid under a mistake of law. Judge Dillon in his work on Municipal Corporations, at section 944, classes together fines and taxes voluntarily paid under a mistake of law. He says: "Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an alleged tax, license or fine, cannot without statutory aid, there being no coercion, no ignorance or mistake of facts, but only ignorance or

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mistake of law, be recovered back from the corporation, either at law or in equity, even though such tax, license, fee or fine could not have been legally demanded and enforced." The rule that money paid under a mistake of law cannot be recovered has frequently been applied in this State to the voluntary payment of illegal and void assessments. Phelps v. Mayor, 112 N. Y. 216; Flynn v. Hurd, 118 id. 19; Vanderbeck v. City of Rochester, 122 id. 285.

There are two classes of cases in which the courts have permitted the recovery of money paid under an erroneous assessment or void judgment, although there was no duress in fact. In one class, the plaintiff is permitted to recover money paid pursuant to a judgment void because of facts outside the record and paid in ignorance of those facts. Tripler v. Mayor, 125 N. Y. 617; S. C., 139 id. 1; Mutual L. Ins. Co. v. Mayor, 144 id. 494. The case before us is clearly not within the rules permitting recovery in those cases. Not only does the complaint fail to allege that payment was made in ignorance of the invalidity of the judgment but the invalidity of the magistrate's decision does not depend upon any facts outside the record but upon the statute limiting his jurisdiction. The plaintiff's mistake is one of law not of fact. In the other class of cases the plaintiff is permitted to recover money paid pursuant to an erroneous assessment or judgment from which appeal is taken and which is subsequently reversed. Clark v. Pinney, 6 Cow. 297; Lott v. Swezey, 29 Barb. 87; Peyser v. Mayor, 70 N. Y. 497; Scholey v. Halsey, 72 id. 578; Haebler v. Myers, 132 id. 363; People v. E. Remington & Sons, 60 Hun, 42; Lawyers' Surety Co. v. Reinach, 25 Misc. Rep. 150. In these cases the money may have been paid under a mistake of law but the payment is not considered voluntary and is said to have been made under coercion of law. In Peyser v. Mayor, 70 N. Y. 501, Judge Folger gives this definition: "Coercion by law is where a court, having jurisdiction of the person and the subject-matter, has rendered a judgment which is collectible in due course. There the party cast in judgment may not resist the execution of it. His only remedy is to obtain a reversal, if he may, for error in it. As he cannot resist the execution of it, when execution is attempted he may as well pay the amount at one time as at another and save the expense of delay." In those cases the judgment pursuant to which the payment was

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made was in full force and effect when payment was made and it was eminently proper that such judgment, until reversed, should be obeyed. In the case at bar the judgment was void for want of jurisdiction, it was a nullity. The plaintiff might properly have resisted it. As there was no judgment requiring obedience, the payment was not made under coercion of law. The case is similar to Bailey v. Buell, 50 N. Y. 662, followed in Drake v. Shurtliff, 24 Hun, 422, where a payment was made under an illegal and void order of a county judge in supplementary proceedings and it was held that the payment was not compulsory or made under legal duress, but was voluntary and plaintiff, therefore, could not recover.

The demurrer must be sustained.

Judgment affirmed, with costs.

GREENBAUM, J. I am of opinion that the Municipal Court had no jurisdiction to entertain this action.

The Greater New York charter (§ 1364, subd. 1) confers jurisdiction upon the Municipal Court in "an action to recover damages upon or for breach of contract, express or implied, other than a promise to marry, where the sum claimed does not exceed five hundred dollars."

Unless the claim of plaintiff may be supported as one arising out of an "implied" contract, it is clear that the Municipal Court, which derives its power solely from the statutes, has no jurisdiction to entertain it.

Is the payment of a fine to the city of New York, by the plaintiff, imposed upon him by a city magistrate in a case where no jurisdiction was vested in the magistrate to impose such fine, a claim resting upon an "implied" contract?

The clear and convincing reasoning of Mr. Justice Danforth in People ex rel. Dusenbury v. Speir, 77 N. Y. 144–150, would seem to furnish a conclusive answer in the negative and to be a binding authority here.

In construing the statute under which a person may be lawfully arrested on civil process in certain cases, in a suit or proceeding instituted for the recovery of "money due upon any judgment or decree founded upon contract or due upon any contract, express or implied, or for the recovery of any damages

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for the non-performance of any contract." The court below had held in the Dusenbury case, *supra,* that "an implied contract existed in law for the payment of the moneys received by the defendant Dusenbury."

Judge Danforth, writing for the court, says: "We cannot agree with the learned judge in this construction of the statute. On the contrary we think that the express contract referred to in the statute is one which has been entered into by the parties, and upon which if broken an action will lie for damages, or is implied, when the intention of the parties if not expressed in words, may be gathered from their acts, and from surrounding circumstances; and in either case must be the result of the free and *bona fide* exercise of the will, producing the '*aggregatio mentium,*' the joining together of two minds, essential to a contract at common law. There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability similar to the rights and liabilities in certain cases of express contract. Thus if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrong-doer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and in fact are not contracts at all. Add. Cont. 22. And a somewhat similar distinction is recognized in the civil law, where it is said: 'In contracts it is the consent of the contracting parties which produces the obligation; in *quasi* contracts there is not any consent. The law alone, or natural equity produces the obligation by rendering obligatory the fact from which it results. Therefore these facts are called *quasi* contracts, because without being contracts, they produce obligations in the same manner as actual contracts.'" Dechen v. Dechen, 59 App. Div. 166, cited in the opinion of Mr. Justice Clarke, is authority for the proposition that the Municipal Courts of the city of New York have jurisdiction in a case where a savings institution paid to a third party moneys deposited with it for the benefit of the plaintiff, where the latter brought an

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action against the third party upon the theory of a ratification and a consequent implied promise of said party to pay to the plaintiff the money so received for the use of the plaintiff.

It seems wholly unnecessary here to consider whether the facts in that case came within the class of cases known as *quasi* contracts or not. It suffices to say that the court made no reference to the Dusenbury case, *supra,* nor is there any intimation that the court even considered the question of a *quasi* contract. The case is, therefore, authority, as long as it stands unreversed, that such facts as were therein shown constituted an implied contract in fact and, therefore, conferred jurisdiction upon the Municipal Court. It is not an authority for the broad proposition that the Municipal Courts have jurisdiction in cases where the claim may only be upheld upon the theory of a *quasi* contract.

The case of Augner v. Mayor, 14 App. Div. 461, is cited as favorable to the appellant's contention here. There an action had been brought against the city, upon the revocation of a liquor license to recover the proportionate share for the unexpired term of the license. An examination of the case shows, that the court by no means repudiated the theory of *quasi* contracts, as laid down in the Dusenbury case, but held by a divided court, that the implied agreement in fact was established by the facts there presented and by virtue of the statute under which the moneys had originally been reserved by the city.

No case has been quoted, which has overruled the principle laid down in the Dusenbury case, that an implied contract will not be predicated upon a state of facts which may give a cause of action upon the theory of a *quasi* contract.

It must, therefore, follow that the Legislature never intended to include cases that may be brought upon the theory of *quasi* contracts, within the jurisdiction of the Municipal Courts. In the case at bar, the facts present a clean-cut case of *quasi* contract. As there was no contract that could be implied from the consent of the parties, there was no contract in fact.

The judgment herein must, for these reasons, be affirmed, with costs.

FREEDMAN, P. J. (concurring). If the amount paid by the plaintiff as a fine were recoverable at all for the reason that the magistrate who imposed the same had no jurisdiction to do so, the

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action could only be maintained on the theory that it is founded on a *quasi* contract as distinguished from an implied contract, and in that view I concur in the opinion of Mr. Justice Greenbaum to the effect, first, that the Municipal Court has no jurisdiction to entertain such an action, and second, that the decision in Dechen v. Dechen, 59 App. Div. 166, is not to be construed into an authority for the proposition that the Municipal Court has jurisdiction of a case resting solely upon a *quasi* contract.

But I am further of the opinion that, upon the facts in this case, no action for the recovery of the fine can be maintained in any court, and upon this branch of the case I concur in so much of the opinion of Mr. Justice Clarke which is to the effect that the plaintiff failed to show duress and only showed voluntary payment of the fine under ignorance or a mistake of law, and that money so paid cannot be recovered without statutory aid. To the cases cited by Mr. Justice Clarke I desire to add the case of Newburgh Savings Bank v. Town of Woodbury, 173 N. Y. 55, in which the point that no action will lie to recover money paid under a mistake of law was elaborately discussed. In the case at bar the plaintiff had been lawfully arrested and brought before the magistrate and the magistrate had acquired jurisdiction over plaintiff's person, and upon proof of probable cause the magistrate might well have held the plaintiff for trial at the Court of Special Sessions. In trying and fining the plaintiff upon the mistaken idea that he had authority to do so, the magistrate, it is true, exceeded his jurisdiction as was subsequently decided in another case. But the plaintiff acquiesced in the sentence imposed upon him and voluntarily paid his fine. No appeal was ever taken. For all that appears, therefore, there was nothing but a mistake of law on the part of both the plaintiff and the magistrate.

The judgment must be affirmed, with costs.

Judgment affirmed, with costs.

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MOSES TANENBAUM, Appellant, *v.* AARON SIMON and JULIUS HERRMAN, Respondents.

(Supreme Court, Appellate Term, March, 1903.)

Fire insurance broker — Breach by his principals of a contract requiring them to insure "use and occupancy" — Meaning of the phrase — Broker's profit on rebates.

Where an insurance broker sues merchants for the alleged loss he sustained by their failure to comply with so much of a contract (authorizing him as agent to insure their buildings, stock, fixtures, etc., for not less than the market value for a term of years at a uniform rate per annum of one dollar on a hundred and pay the premiums) as required them to insure "use and occupancy," he is entitled to nominal damages where it appears that they did not insure "use and occupancy."

The phrase "use and occupancy" refers to the business use of which the property is capable in its existing condition and does not include either profits of the business or the salaries of two salesmen whom the defendants employed by the year.

Under such a contract, where running policies of the standard form are canceled by the insurers and the premiums paid are retained by them *pro rata* only, the defendants cannot counterclaim against the agent the difference, in the amount of the rebates, between what they would have been upon the basis of a dollar a hundred, the contract rate, and what they were on the basis of the lower rate paid by the broker and named in the policies, and this because when he delivered the policies to the defendants his liability ceased and they thereupon assumed direct contractual relations, with the insurers, binding them to accept on cancellation whatever the policies stipulated.

APPEAL by the plaintiff from a judgment, entered in the City Court of the city of New York, on the dismissal of the plaintiff's complaint, and on the direction of a verdict, in favor of the defendants, on their counterclaim.

Leo N. Levi (Adolph B. Rosenfield, of counsel), for appellant.

Emanuel S. Cahn, for respondents.

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FREEDMAN, P. J. This case was tried in the court below upon an agreed statement of facts. The action is based upon a written contract, executed by the parties, which contract, among other things, provides as follows: "That the said firm of T. Tanenbaum & Co. (plaintiff's assignor) is hereby authorized to and shall, as agents of the parties of the second part and for their account, procure and pay premiums for all fire insurance required by the parties of the second part, not less however than the market value at any time, of the property insured, for the period of time from the 23d day of Dec. 1897 to the First day of Feb. 1901 upon merchandise, machinery, furniture and fixtures, use and occupancy, building and rents, contained in the building and premises known as 688 Broadway, N. Y. City in any of the companies or underwriters named in schedule A. annexed to and forming a part hereof * * * at the uniform rate of one dollar per year for every hundred dollars of insurance procured."

The defendants complied with the conditions of this contract and obtained insurance, through the plaintiff as agent, upon all the property mentioned as above except that they failed to take any insurance upon use and occupancy. The plaintiff brought this action for breach of this contract in failing to take out insurance upon "use and occupancy." It is conceded that, at all times during the years covered by said contract, the plaintiff could have procured such insurance, in the companies named in the contract, at a total cost to the plaintiff of thirty cents per year for every hundred dollars of such insurance; the plaintiff's claim in this action being the difference between the contract price agreed to be paid by the defendants for insurance upon use and occupancy and the price at which the plaintiff could have obtained it had the defendants been insured therefor at its market value.

All the policies procured for and delivered to the defendants under and by virtue of the contract aforesaid, contained this clause: "This policy shall be cancelled at any time at the request of the insured, or by the company, by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rates; except that when the policy is cancelled by this Company by giving notice, it shall retain only the *pro rata* premium."

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Pursuant to this clause, commonly called the cancellation clause, several of the policies issued to the defendants were cancelled, the return or unearned premiums, payable by the several companies whose policies were cancelled, were paid to the plaintiff for the account of the defendants and the plaintiff paid the same to the defendants. The companies cancelling the policies calculated and computed the return or unearned premium upon the basis of the total premium named in the policies, and paid the plaintiff said sums.

The defendants claim that inasmuch as they paid for said policies at the rate called for in their contract with the plaintiff, the return premium for the unexpired term of said policies should be calculated upon the basis of what the defendants actually paid, and not upon the basis charged by the companies — as the sum paid by the defendants to the plaintiff under their contract, was in every case a larger sum than the plaintiff paid the companies, the defendants set up a counterclaim in this action for such excess, which was conceded to be in the aggregate the sum of eighty-seven dollars and seventy-seven cents.

The learned trial judge in the City Court, in construing the terms of the contract between the parties, decided that such contract did not require the defendants to take insurance upon use and occupancy. That it was optional with the defendants whether to procure such insurance or not, and, therefore, he dismissed the complaint. He also held that the contention of the defendants, as to the manner in which the rebates on canceled policies should be calculated, was correct and directed a verdict for the defendants upon their counterclaim for said sum of eighty-seven dollars seventy-seven cents.

In the case of Tanenbaum v. Freundlich, decided by the December Appellate Term (39 Misc. Rep. 819), the contract between the parties was similar to the one in the case at bar, except that, in the Freundlich contract, the defendant was obliged to take not less than $20,000 of insurance per year and not less than the market value at any time of the property insured. In that case, the plaintiff brought his action for damages for failure by the defendant to take any insurance upon use and occupancy and this court held, Mr. Justice Clarke writing the opinion, " That the defendant was required through plaintiff to take out insurance, at least to the

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amount of $20,000, and if the market value was in excess of said sum, to the amount of said market value." Following that decision the judgment of the trial court, in dismissing the plaintiff's complaint in the case at bar upon the ground that it was optional with the defendants to determine whether or not insurance upon use and occupancy was required by them, was error. Clearly, under the agreed statement of facts, the defendants being bound by their contract to insure against loss of "use and occupancy" to the amount of the market value thereof, and having failed to take any insurance therefor, there was a breach of the contract on their part and the plaintiff was entitled to recover at least nominal damages.

The right of the plaintiff to recover more than nominal damages depends upon whether or not the plaintiff has shown what the market value of "use and occupancy" of the defendants' premises was during the period covered by the contract. The ninth paragraph in the agreed statement is as follows: "That the general scope, policy and design of the defendants' business have during the entire term covered by said contract and now is, to manufacture and sell during such fiscal year ending Sept. 30th clothing to the amount of approximately $300,000, at a gross profit of approximately $75,000 and at a total expense of approximately $28,000. That of this contemplated expense the sum of $5,000 is a fixed annual expense of defendants' business, being the balance agreed to be paid to two salesmen of defendants, under contracts of employment with said salesmen for a period of one year from the beginning of each fiscal year. That the estimate of the annual expenses of defendants' business save as to the $5,000 aforesaid, is dependent upon the continuance of said business for the entire fiscal year, as all expenses over and above said $5,000 are of such a nature as would cease with the cessation of defendants' business." Then follows a statement of the amount of business done by the defendants for the years ending September 30, 1899 and 1900, the gross profits and expenses each year, from which the sum representing the net profits made by them during those years respectively can be easily calculated. It is these profits and fixed charges each year, that the defendants would have lost had their business been interrupted during the years aforesaid and these alone, that the plaintiff assumes to be the market value of use and occupancy, and to cover this possible loss

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the plaintiff claims that the defendants should have taken insurance, or, in other words, the plaintiff claims that the aggregate amount of the net profits of the defendants' business during the years covered by the contract, plus the fixed charges aforesaid, is the sum for which defendants were obligated in their contract to insure as the market value of the use and occupancy of their premises.

It was held, however, in the Freundlich case, following Michael v. Prussian Nat. Ins. Co., 171 N. Y. 25, that "Profits of the business were quite another insurable risk and not at all covered by the phrase 'use and occupancy.'" This decision effectually eliminates "profits" of a business as fixing the market value of premises used for business purposes or even forming any basis for calculating such value. Nor, in the case at bar, do the fixed charges, mentioned in the statement of facts, constitute the market value of use and occupancy. As stated in Michael v. Insurance Co., *supra*, "Insurance 'on use and occupancy,' evidently, relates to the business use, which the property is capable of in its existing condition. If it is destroyed by fire and its use becomes impossible, then, during the period required for its reinstatement as property capable of use and occupation, the owner is to be compensated." Although the defendants were compelled to pay for the salaries of their two salesmen $5,000 each year, such charges have no relation to the business use to which the premises of the defendants might be put, nor to its availability for business purposes. If "profits" are not covered by the term "use and occupancy," then surely fixed charges of the character named herein are not covered thereby. Profits of a business are always an uncertain element and speculative to a certain extent, and market values ought not to be fixed upon a basis so doubtful and unreliable. It was said in Michael v. Insurance Co., *supra*, "That the defendant might have avoided all questions of construction and have made plain the subject of its insurance, if it was the business of the plaintiff or its earnings and profits."

So, in the case at bar, the plaintiff could have (as he did in the Freundlich case) provided in the contract that the defendants take a named amount upon "use and occupancy." In the absence of such a provision it is incumbent upon the plaintiff to show by definite and certain testimony what the market value of the use and occupancy of the defendants' premiums was, during the time covered by the contract, and what the character of the testimony

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shall be is for the plaintiff to elect and the court to determine when presented.

Upon the question of the allowance of the defendants' counterclaim, we think they are not entitled to the return premiums based upon the contract rate. The plaintiff was authorized to obtain policies of insurance for the defendants, they agreeing to pay him a certain uniform rate without regard to what he was required to pay. He procured the only form of policy provided by the laws of the State. The defendants, it must be assumed, knew what their policies would contain when they contracted with the plaintiff to procure them. They agreed to and did accept such policies. When the policies were obtained and delivered to the defendants by the plaintiff, his contract was fulfilled and his liability ceased. The defendants then assumed contractual relations with the insurance companies whose policies they held, and both parties were bound by the conditions contained therein. One condition was contained in the cancellation clause before referred to. Either party, named in the policies, had a right to avail itself of the privilege contained in said clause. The defendants could have protected themselves in their contract with the plaintiff by inserting therein, that, in the event of any of the companies cancelling their policies, the plaintiff should return to them the unearned premium based upon the contract rate. This was not done. The defendants could, therefore, look only to the companies, that cancelled their policies, for the amount of unearned premiums calculated as provided for in the cancellation clause aforesaid. If these views are correct the plaintiff in this action, upon the agreed statement of facts, should have had a judgment for six cents damages and the defendants' counterclaim should have been denied. The judgment must, therefore, be modified by reversing the judgment in the court below and ordering judgment in favor of the plaintiff for six cents damages, without costs to either party on this appeal.

Judgment modified by reversing the judgment of the court below, granting judgment absolute in favor of plaintiff for six cents damages, and as modified, affirmed, without costs to either party upon this appeal, with leave to enter or both parties to appeal to the Appellate Division.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment modified, and, as modified, affirmed, without costs.

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JOHN McCARTHY, Respondent, *v.* THOMAS McCARTHY, Appellant.

(Supreme Court, Appellate Term, March, 1903.)

Conversion — Complaint by a co-tenant of personalty — Exclusive possession by the other tenant.

A complaint, in conversion, by one of two sons, equal legatees under their father's will, of his trucking business, alleging that the other son is in possession and has refused on demand to pay the plaintiff for his half, states no cause of action where it fails to allege facts showing that the property can be actually divided and severed, and does not allege any sale or loss or destruction of the property itself or any destruction of the plaintiff's power of beneficial enjoyment.

APPEAL from an interlocutory judgment of the Special Term of the City Court of the city of New York, overruling a demurrer to the complaint, with leave to answer on payment of costs.

Maas & Goldberg, for appellant.

Patrick J. O'Beirne (Hector M. Hitchings, of counsel), for respondent.

GILDERSLEEVE, J. This action was brought in conversion to recover from the defendant $350 damage which the plaintiff claims to have sustained through the retention, by defendant, after demand, of the plaintiff's interest in horses, trucks and trucking business bequeathed to the parties here, who are brothers, by their father "to be divided equally between them."

The appeal is from an interlocutory judgment overruling a demurrer, to the complaint, interposed upon the ground that the complaint does not state facts sufficient to constitute a cause of action. We think the judgment of the trial court should be reversed.

The facts alleged in the complaint, and upon which the plaintiff

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relies to establish his alleged cause of action, do not show conversion. The facts in brief, as pleaded, are as follows, viz.: That the plaintiff and defendant are co-owners of certain horses, trucks, harness and trucking business; that since the death of their testator the property has been in the possession of the defendant; that the plaintiff has demanded his one-half of the defendant; that the defendant has refused to pay the same and that the property is still in the possession of the defendant, and then follows the allegation of conversion. The allegation of a conversion, being a deduction from the facts alleged and merely a legal conclusion, is not admitted by the demurrer. Greentree v. Rosenstock, 61 N. Y. 583; Segelken v. Meyer, 94 id. 484; Conaughty v. Nichols, 42 id. 83.

There is no allegation of a wrongful taking. The conversion relied upon is that which is assumed to have arisen upon the defendant's refusal to deliver over, on demand, plaintiff's equal one-half ownership in the property. The pleading is defective in not stating the number of horses, trucks and other details from which it may appear that the property is definitely severable in rate, measure or weight, into proportions absolutely alike in quality and value. There is no allegation of loss, destruction or sale of the property itself or of the power of beneficial enjoyment by the cotenant. These facts will not be presumed.

The rules of law applicable to the questions presented on this appeal are clearly set forth in Osborn v. Schenck, 83 N. Y. 203. "When, and for what cause, one of two or more tenants in common of personal property may maintain trover against those retaining its possession is sufficiently clear on principle, but not always of easy application to confused and varying facts. The right of each to the use and possession of the property is precisely the same, and neither can have or exercise a superior authority over the other. It follows necessarily that the mere fact of such possession and use by one, even though it prevents the use and possession of the other can furnish no ground of action, since it is rightful, and rests upon a lawful authority. But it also follows that if that possession develops into a destruction of the property, or of the interest of the cotenant, or into such a hostile appropriation of it as excludes the possibility of beneficial enjoyment by him, or ends in a sale of the whole property which ignores and denies any other right, then a conversion is estab-

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lished and trover may be maintained against the wrongdoer." And at page 206: "To sustain his liability in this case we must practically abrogate the rule so long and thoroughly established, of the absolute equality of right of tenants in common, and hold that the mere taking possession of the common property by one, coupled with an assertion of his right to do so, is a wrong for which trover may be maintained. No case goes that length. In all there was some additional and decisive fact beyond the possession and claim of right to retain it. There was either a destruction of the property itself or of the power of beneficial enjoyment by the co-tenant."

The judgment of the trial court overruling the demurrer must be reversed and the demurrer sustained, with costs, with leave to plaintiff, on payment of such costs, to serve an amended complaint.

FREEDMAN, P. J., and GIEGERICH, J., concur.

Judgment of trial court overruling demurrer reversed and demurrer sustained, with costs, with leave to plaintiff, on payment of costs, to serve an amended complaint.

AUGUSTA HAKONSON, Respondent, *v.* THE METROPOLITAN STREET RAILWAY CO., Appellant.

(Supreme Court, Appellate Term, March, 1903.)

City Court of the city of New York — Costs, after notice of trial, where a disagreement is followed by a verdict — Mileage.

Only one item of costs, after notice of trial, can be taxed in the City Court of the city of New York where the jury disagree upon the first trial and find a verdict upon the second.

Prospective mileage cannot be taxed as sheriff's fees where there is no proof that mileage will amount to any sum whatever.

APPEAL from an order of the Special Term of the City Court of the city of New York, denying the defendant's motion for a retaxation of costs.

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H. A. Robinson (F. A. Gaynor, of counsel), for appellant.

Leon Kronfeld and I. Henry Harris, for respondent.

GILDERSLEEVE, J. The action was tried twice. The first trial resulted in a disagreement of the jury, and the second one in a verdict for plaintiff. The clerk taxed two items for costs after notice of trial and two dollars and fifty cents for prospective sheriff's fees, both under objection of the defendant, who applied to the Special Term of the City Court for a retaxation, disallowing one of the items for costs after notice of trial and the sum of two dollars and fifty cents for sheriff's prospective fees. The motion was denied. The defendant appeals.

The Appellate Term of this department has held, in the case of Gilroy v. Badger, 28 Misc. Rep. 143, that two items for costs, after notice of trial, may be allowed in favor of the party who is finally successful, where two trials were had, even though one of them, on the short cause calendar, was an unfinished trial by reason of the trial having proceeded for an hour, without being concluded, and the cause, under the rule, was sent back to the general calendar.

The Appellate Division of the Second Department, in a more recent decision, in the case of Seifter v. Brooklyn Heights R. R. Co., 53 App. Div. 443, has held that only one such item can be taxed where the first trial resulted in a disagreement of the jury, as did the first trial in the case at bar. The court gave, as a special reason for the rule laid down, the fact that in Kings county the practice requires but one notice of trial, except in case of a new trial, and that there is no new trial where a jury disagrees. The same reasons may be urged in this department. See also the case of Hudson v. Erie R. R. Co., 57 App. Div. 99; likewise a decision of the Appellate Division of the Second Department.

We must follow the decision of the Appellate Division of the Second Department, and adopt the view that only one item for costs after notice of trial should have been allowed.

As to the other item to which defendant objected, the statute allowed the sheriff a fee of one dollar and seventy-five cents, and mileage at the rate of ten cents per mile one way. There was no evidence whatever on the taxation of costs, nor is any offered on this appeal, to warrant a conclusion that the mileage would

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amount to seventy-five cents or to any other sum. It was, therefore, error to allow the extra seventy-five cents for sheriff's fees.

The order must be reversed with ten dollars costs and disbursements, and the bill of costs retaxed as above indicated.

FREEDMAN, P. J., and GIEGERICH, J., concur.

Order reversed, with ten dollars costs and disbursements.

SALLIE BLOCH, Appellant, *v.* CHARLES A. LINSLEY et al., Respondents.

(Supreme Court, Appellate Term, March, 1903.)

Costs — On a new trial had "pursuant to an order granting the same" — Code Civ. Pro., § 3251, subd. 3.

A plaintiff, who withdraws a juror upon the first trial and, after having the case restored by an order to the day calendar for trial at a subsequent term, succeeds on the second trial, is not entitled, upon the theory that a new trial has been had "pursuant to an order granting the same" (Code Civ. Pro., § 3251, subd. 3), to tax twenty-five dollars for all proceedings after the granting of and before the new trial, as the order restoring the case to the day calendar is the only order granted since the withdrawal of the juror and that cannot be deemed an order for a new trial.

APPEAL from an order of General Term of the City Court of the city of New York, affirming an order of the Special Term, denying defendants' motion for a new taxation of costs.

Lyman A. Spalding, for appellant.

Ira Leo Bamberger, for respondents.

GILDERSLEEVE, J. The action came on twice for trial. On the first trial the plaintiff withdrew a juror. On the second trial the plaintiff obtained a verdict. On the taxation of costs the sum of twenty-five dollars was allowed "after the granting of and before the new trial." The defendants on motion for a new tax-

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ation, insisted that this item should be disallowed. The Code, section 3251, subdivision 3, provides that: "Where a new trial is had, pursuant to an order granting the same, * * * for all proceedings after the granting of, and before the new trial, * * * twenty-five dollars."

We think the taxation of the twenty-five dollars was erroneous. It is true that, in view of the authorities, it must be held that when a trial has been duly commenced, and the court has allowed the withdrawal of a juror and the discontinuance of the trial, it is a trial, within the meaning of the Code, for the purpose of taxing a trial fee to the party finally successful. In the case at bar the juror was withdrawn at the instance of the plaintiff, who, upon succeeding at the second trial, procured the taxation of twenty-five dollars costs, upon the theory that a new trial, pursuant to an order granting the same, had been had, within the meaning of the tenth paragraph of subdivision 3 of section 3251 of the Code of Civil Procedure, above quoted. It is only, after the trial of an action, that an order may be made, granting a new trial, so as to entitle the successful party to tax the item of twenty-five dollars costs here under consideration. The only order here made, subsequent to the withdrawal of a juror, was an order restoring the cause to the day calendar for trial at a subsequent term. Such an order cannot properly be characterized as an order for a new trial. There was no order granting a new trial, and for this reason the item of twenty-five dollars costs after the granting of and before the new trial was improperly taxed.

The order of the court below is reversed, with ten dollars costs and disbursements, and the motion to disallow the item of twenty-five dollars for proceedings after the granting of and before the new trial is granted, with ten dollars costs.

FREEDMAN, P. J., and GIEGERICH, J., concur.

Order reversed, with ten dollars costs and disbursements, and motion for a new trial granted, with ten dollars costs.

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WILLIAM SOULS, Respondent, *v.* WILLIAM LOWENTHAL and DAVID LOWENTHAL, Composing the Firm of W. LOWENTHAL & Co., Appellants.

(Supreme Court, Appellate Term, March, 1903.)

Warehouseman — Liability at law on his contract to insure goods stored and thereafter burned — Rule as to best evidence — Apportionment of insurance moneys when unnecessary.

Where materials to be manufactured are deposited with warehousemen in reliance upon their assurance that the materials will be insured against fire under existing general policies held by them, the owner of the materials may, upon their destruction by fire while in storage, recover at law of the warehousemen, *pro rata*, upon the basis of the insurance moneys they recovered for their entire loss where existing general policies paid them cover his property and exceed his loss.

Where at least two paid policies, sufficiently describing the materials and exceeding their value, are in evidence, the rule requiring the production of the best evidence is not violated by admitting, upon the part of the plaintiff, the proofs under those policies, although they describe all the other policies not in evidence, nor is the rule violated by permitting one of the warehousemen to testify that they have all the policies.

Where the warehousemen have thus received on the two policies money enough to pay the plaintiff, who sues for himself alone, the terms and conditions of the other policies are not material, as there is no necessity to go into equity for an apportionment of all the insurance moneys among all the losers.

APPEAL by the defendants from a judgment of the General Term of the City Court of the city of New York, affirming a judgment in favor of the plaintiff, entered at a Trial Term upon a verdict directed by the court.

James F. Lynch (J. Murray Downs and Robert G. Scherer, of counsel), for appellants.

Chittenden & Fiero (Joshua M. Fiero, of counsel), for respondent.

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GIEGERICH, J. The action is brought to recover a sum of money received by defendants as insurance upon goods belonging to the plaintiff, but burned while in their possession.

The goods were alleged to have been "materials, hair, rags, and waste" which were to be manufactured by the defendants into merchandise for the plaintiff. The evidence was that before the goods had been sent to the defendants they had told the plaintiff that all his goods, while in their possession, were covered by general policies of insurance, in reliance on which statement he carried no special insurance, nor any insurance on them, in his own name.

Before they were manufactured as intended, the defendants' storehouse, in which they had been placed, was burned with its contents.

The defendants reported the loss to the plaintiff and told him that when they received their insurance they would "make it right." They also asked what the value of the goods was, and were informed that it was about $200 or $175, and stated that they hoped they had ample insurance to cover his loss, but had not yet made up their proofs of loss and could not tell. Thereafter they made up their proofs of loss and included therein an item of $175 for goods belonging to the plaintiff.

No evidence was presented for the defense. Both sides having moved for a direction of a verdict, the court directed the jury to find in favor of the plaintiff, and from the judgment entered on such finding an appeal was taken to the General Term of the court below which affirmed the judgment and from that affirmance an appeal has been taken to this court.

The defendants insist that the case of Gutman v. Rogers, 34 N. Y. St. Repr. 690; 37 id. 264, is decisive against the plaintiff, who rejoins that that case is unsound and in conflict with Roberts v. Ely, 113 N. Y. 128, and other decisions of the Court of Appeals.

I cannot discover any conflict between those two cases however. In the former it was said when the appeal was before the General Term of the late Court of Common Pleas, 37 N. Y. St. Repr. 264: "That defendant had never agreed to insure plaintiff's goods; that plaintiff never asked defendant to insure his goods; that plaintiff did not know until after the fire that there was any insurance," and again at page 267, "The properties of eleven several persons,

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who might claim the benefit of respondent's insurance, were destroyed by the fire. These properties were of unequal values, so that, to ascertain the proportion of indemnity payable to each, an accounting in equity was indispensable."

The court, therefore, held that the dismissal of the complaint was justifiable.

In Roberts v. Ely, 113 N. Y. 128, on the contrary, it appeared that Geiger & Co., the plaintiff's assignor, purchased of the defendant's testator a quantity of teas, then in the custody of the Chicago & China Tea Company; that it was agreed between the purchasers and that company that it should hold the teas in store and insure the same for their benefit, which it did, together with other teas belonging to defendant's testator; that the teas so insured were destroyed by fire and the insurance money for the whole was collected and received by defendant's testator, who refused to pay over or account for the same to Geiger & Co.

The court held that "The right of Geiger & Co. to recover the money was perfect from the time of its actual receipt" by the defendant's testator.

The following remarks, at page 131, made in the course of the opinion, emphasize the difference of that case from Gutman v. Rogers and its likeness to this case: "There is also proof tending to show that it was understood between Geiger & Co. and the Chicago & China Tea Company, subsequent to the purchase and before the fire, that the interest of Geiger & Co. was to be protected by insurance;" and at page 132, "That firm (Geiger & Co.) and Ely (defendant's testator) were alone interested in the question, as it is conceded that Ely was entitled to all the money received, subject only to the claim of Geiger & Co. The only accounting required was such as was necessary to ascertain the extent of the interest of Geiger & Co., and that depended upon simple facts as readily ascertainable in a legal as in an equitable action."

Neither do I think the exceptions to rulings on evidence present any error which would warrant a reversal of the judgment.

There were offered and received in evidence two policies of fire insurance of $2,000 each issued by the Manhattan Fire Insurance Company to the defendants "on merchandise, hazardous, nonhazardous, and extra hazardous, including packages of their own, or held by them in trust, or on commission, or sold, but not removed, contained," etc., in the defendants' storage warehouse,

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which was burned. Two drafts for $2,000 each given by the said insurance company to the defendants, with the latter's indorsements and with their receipt annexed were also put in evidence. Next, the proofs of loss sworn to by one of the defendants, which had been submitted by them to this company on these policies were offered and received in evidence against the objection of the defendants' attorney. These proofs, as appears by the summary thereof printed in the record, state and show by a detailed list of the companies, policy numbers and amounts, that there was an aggregate insurance of $37,500 on the contents of the warehouse. They also state, and show by an itemized inventory, that the value of the insured property at the time of the fire was $38,984.66 and the losses $38,984.66. They also contain the statement, "The companies pay $37,500." One of the items in this inventory was as follows: "Wool stock from William Souls, $175." Objection to the admission of these proofs of loss was made on the ground that they were immaterial; that the policies of insurance were the best evidence, and "on the further ground that the plaintiff may not offer in evidence one of a series of papers, but must offer every policy of insurance, every proof of loss and every release, so that the whole transaction may be here before the court." The defendant, who subscribed these proofs of loss, was also put on the stand on behalf of the plaintiff and was asked whether they had the policies in the other companies as therein specified, and he answered "yes," before the objection that the policies were the best evidence was ruled upon. The motion to strike the answer out was denied and an exception taken.

It is contended now on appeal that there was nothing to identify the plaintiff's property described in the complaint as the "wool stock" mentioned in the proofs of loss. I think, however, that there was a sufficient identification, and besides this defect of proof, if it was such, was not specified by the defendants' attorneys at any time during the trial.

It is also claimed that it was error to admit the proofs of loss and the testimony of one of the defendants that they had the policies therein specified, and in support of this claim the principle stated in Dow v. Whetten, 8 Wend. 166, is invoked, viz.: That when a party is claiming under a contract, as having been made for his benefit, and the contract is in writing, the writing is the best evidence.

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I do not think, however, under the circumstances of this case, that this rule applies. It is undisputed that the plaintiff deposited his goods with the defendants under the assurance of the latter that they would be covered while in their possession by general policies of insurance. It is shown, moreover, that they were so covered by at least two such policies of $2,000, on which the defendants received payment in full. Under these circumstances, I do not think the exact terms of the remaining policies are material, as between the plaintiff and the defendants. If others besides the plaintiff were interested, as often happens in similar cases, in the moneys which the defendants held in trust or for the benefit of a number, and the insurance was insufficient to cover the losses, then the terms of the various policies would be important upon an accounting to ascertain how the funds should be apportioned; but no such question can arise here, as it does not appear that any one besides the plaintiff and the defendants have any interest in these moneys, and the latter cannot be heard to say, after their assurance to the plaintiff above mentioned and on which he relied, that his goods were not covered by the policies equally with their own.

The recovery allowed was such portion of $175 as $37,500 bears to $38,984.66.

The judgment should be affirmed, with costs.

FREEDMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment affirmed, with costs.

JAMES HIMBERG, Respondent, v. MARK H. ROGERS, Appellant.

(Supreme Court, Appellate Term, March, 1903.)

Costs — On a discontinuance after the parties have settled the action between themselves.

Where the parties to an action settle it between themselves and the attorneys for the defendant, after having been refused by the attorneys for the plaintiff a discontinuance without costs or further time to plead, are compelled by the conduct of those attorneys to

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interpose an answer alleging the settlement and to file a note of issue and serve a notice of trial, the subsequent motion of the plaintiff's attorneys to discontinue without costs will not be granted except on payment of the defendant's costs and disbursements of the action and of the motion.

APPEAL by the defendant from an order of the City Court of the city of New York, granting the plaintiff's motion to discontinue the action without costs, except ten dollars costs of motion.

Myers, Goldsmith & Bronner (Jacob M. Schoenfeld, of counsel), for appellant.

Sanders & Feltenstein, for respondent.

GIEGERICH, J. This action, begun on the 24th day of May, 1902, by the service of a summons, was brought to recover the sum of $115, for goods sold and delivered by the plaintiff to the defendant. On the twenty-eighth day of May following, the defendant served a notice of appearance upon the plaintiff's attorneys. The action, having been settled between the parties, the defendant's attorneys requested the plaintiff's attorneys to consent to the discontinuance of the action, without costs, which they refused to do, and they also refused, after having given various extensions, to grant the defendant any further extension of time to plead. The latter then, on the seventeenth day of September, served an answer, alleging that the action had been settled between the parties. After the service of the answer the defendant's attorneys again requested the attorneys for the plaintiff to discontinue the action without costs, and they again refused. On the 5th day of January, 1903, the defendant filed a note of issue and served a notice of trial, and thereafter the plaintiff's attorneys asked the defendant's attorneys for their consent to discontinue the action without costs, which was refused, and the plaintiff's attorneys then made a motion for an order discontinuing the action without costs, which was granted; ten dollars costs for opposing the motion being allowed to the defendant. From the order so granted and entered, the defendant has appealed to this court.

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The defendant was entitled, as matter of right, even after suit brought, to set up the settlement of the action by way of defense. Willis v. Chipp, 9 How. Pr. 568; Bronner Brick Co. v. M. M. Canda Co., 18 Misc. Rep. 681, 683.

While such settlement, in the absence of an agreement to reserve them, had the effect of extinguishing the plaintiff's costs (Bronner Brick Co. v. M. M. Canda Co., *supra*), the same, if established upon the trial, would not, however, have prevented the defendant from recovering costs. Bendit v. Annesley, 42 Barb. 192; Rice v. Childs, 28 Hun, 303. Inasmuch as the defendant would have been entitled to costs had he succeeded in establishing his said defense upon the trial, the question arises whether, under the circumstances disclosed by the record, the plaintiff should have been permitted to discontinue the action without any costs, save those allowed the defendant for opposing the motion. In De Barante v. Deyermand, 41 N. Y. 355, 357, the court said: "The rule in regard to costs, where the court grants leave to the plaintiff to discontinue his action without bringing the issues to trial, cannot be said to be one absolutely of law, or resting in absolute legal right. The question of costs in such cases rests upon the action of the courts, depending very much upon discretion. The courts have allowed or disallowed them as they have deemed the claim to them just or unjust." It was decided in Agar v. Tibbets, 56 Hun, 272–275, that a discontinuance of a common-law action without payment of the defendant's costs would not be granted "except in a case where such an award of costs would work manifest injustice to the plaintiff." This doctrine was applied in the case of Layman v. New York Bank Note Co., 20 N. Y. Supp. 431, where it was held that while the granting of an application to discontinue, without costs, was within the discretionary power of the court, such power should, nevertheless, be exercised "with caution," and that the cases, within which a plaintiff is allowed to discontine without costs, "are exceptional."

The cases, which have been regarded as an exception to the rule, are set forth in the two cases last cited, and may briefly be summarized as follows: The defendant's discharge in bankruptcy after suit brought; the defendant's concealment of infancy from the plaintiff; the repeal of the law imposing a penalty after action therefor has been commenced; and the intrusion of a person,

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named as a defendant by mistake and not served with process, into a litigation, the result of which could in no manner affect his interest.

The case at bar does not fall under either one of these exceptions. While we think that, where a settlement is effected between the parties, without the knowledge or presence of the attorneys, a discontinuance, without costs, may be permitted, yet, in view of the peculiar state of facts presented by the record, we feel that such course should not have been pursued in the present case.

The affidavits presented in opposition to the motion alleged, without denial by the plaintiff, that the attorneys for the plaintiff, although frequently requested before and after the service of the answer, to consent to a discontinuance of the suit, without costs, refused to do so. The defendant was then put to the expense of preparing and serving an answer, and again, after joinder of issue, of filing a note of issue and serving a notice of trial.

The service of an answer was necessary in view of the plaintiff's attorneys' refusal to give any further extension of time to plead or to consent to the discontinuance of the action, without costs, and, having thus put the defendant to the necessity of answering to avoid the entry of a judgment against him for failure to plead, the plaintiff should, in reason and justice, be compelled to pay the additional expense, to which the defendant was put to protect his rights, as measured by the taxable costs in consequence of such refusal.

The plaintiff argues that, in order to obtain a discontinuance, the defendant should not have put the case on the calendar and served a notice of trial, but that upon his refusal to discontinue, without costs, the defendant should "have made a motion to compel plaintiff to reply to the separate defense set up, and on succeeding in said motion he would have obtained costs." This argument, however, is fallacious, because the defendant, in order to obtain a determination of the action, would have been put to expense, whether he pursued this remedy or the one afforded by the filing of a note of issue and the service of an answer.

For the reason above given, the order appealed from should be modified by granting the plaintiff's motion only upon the payment of the defendant's taxable costs and disbursements, besides

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the costs of the motion, and, as modified, affirmed, but without costs of this appeal to either party as against the other.

FREEDMAN, P. J., and GILDERSLEEVE, J., concur.

Order modified by granting plaintiff's motion only upon payment of defendant's taxable costs and disbursements, besides costs of motion, and, as so modified, affirmed, but without costs of this appeal to either party as against the other.

BRYAN W. TICHENOR, Appellant, *v.* SAMUEL BRUCKHEIMER, as Receiver of the LAWYERS' STENOGRAPHIC AND PRINTING COMPANY, Respondent.

(Supreme Court, Appellate Term, March, 1903.)

Master and servant — Complaint for wages, alleging performance — Excuse for nonperformance.

Where a person, hired in 1901, by a corporation, now insolvent, for five years at a yearly salary payable in equal weekly installments, sues for salary unpaid for twenty-three weeks and pleads the contract in its effect and alleges that he has "duly performed all the conditions thereof on his part," his complaint should not be dismissed upon the theory that he has alleged, and has not proved, performance for five years, for the complaint must be deemed to allege performance only during the time for which he sued.

Where the servant is to be, but is not, paid weekly, his abandonment of the service does not estop him from recovering what he has earned.

APPEAL from a judgment of the City Court of the city of New York, dismissing the complaint, and from an order denying a motion for a new trial.

Bowers & Sands (Van Sinderen Lindsley, of counsel), for appellant.

Blumenthal, Moss & Feiner (Benjamin F. Feiner, of counsel), for respondent.

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GIEGERICH, J. The plaintiff was employed by the defendant receiver's corporation, before its insolvency, on the 29th day of March, 1901, for a term of five years, beginning April 1, 1901, at a yearly salary of $1,700, to be paid in equal weekly instalments.

The action is brought for an unpaid balance under this contract for a period of twenty-three weeks, extending from April 1, 1901, to September 17, 1901, the total amount earned for that time being, as alleged, $751.87, of which $438.49 is admitted in the complaint to have been paid, and judgment is demanded for the balance of $313.38. After pleading the contract in its effect, the complaint alleges that "the plaintiff duly performed all the conditions thereof on his part." Upon the trial the plaintiff proved performance of his duties under the contract up to the 9th day of September, 1901. Upon cross-examination, he admitted that he left the employment on the latter date. On redirect, he was asked why he did so, but was not allowed to answer, objection being made that the inquiry was irrelevant, immaterial, and incompetent. The complaint was then dismissed for failure of proof, and a motion made on the minutes for a new trial was denied.

The theory of the dismissal seems to be that as the contract was for a term of five years and the plaintiff averred performance of all the conditions on his part, he could not recover, under that state of the pleadings, without proof of performance for the entire five years.

In support of the decision the familiar rule is invoked that, under an allegation of performance, excuse for nonperformance cannot be proved. Oakley v. Morton, 11 N. Y. 25; Schnaier v. Nathan, 31 App. Div. 225; La Chicotte v. Richmond R. & El. Co., 15 id. 380.

In this case, however, there is an excuse for nonperformance pleaded, viz.: the failure of the employer to pay the installments as they fell due. In Wood on Master and Servant (§ 85), it is said: "When by contract of hiring the servant is to be paid monthly or quarterly or at any stated periods, when such periods arrive a right of action to the extent of the wages then earned attaches, and even though the servant abandons the service after the wages have so become due and payable to him for part performance, he can sue for and recover the amount. It is only in

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cases where the contract is entire and performance is a condition precedent to the payment that no recovery can be had for partial performance. When the contract provides for payment of wages, weekly, monthly, or quarterly, a failure to pay according to the contract furnishes a good excuse on the part of the servant for putting an end to the service unless payment at the time is expressly waived by the servant, and a mere neglect to call for his pay for several months does not operate as a waiver." So, too, in Tipton v. Feitner, 20 N. Y. 423, the court said, at page 429: "But suppose a contract for a year, the employers agreeing to pay the servant ten dollars at the end of each month; and a part performance and subsequent breach by the servant, the employer being in arrear for several full months. In such a case, I conceive that the servant should be permitted to recover for the wages earned, subject to recoupment of the master's damages for the time covered by the breach. I am ignorant of any principle upon which it could be held that he could not recover anything. It certainly cannot be upon the ground of the nonperformance of a condition precedent; for it is absurd to say, that under such a contract, serving the last month was a condition to the payment for the first." See also Strack v. Hurd, 41 N. Y. St. Repr. 777; Penniman v. LaGrange, 23 Misc. Rep. 653.

To construe the allegation of performance in the present instance as meaning rendering of services up to the 31st day of March, 1906, the date on which the contract term would expire, and to refuse any relief because such performance could not be shown, is a thing that obviously should not be done except as a last resort, and in the absence of any reasonable interpretation that can be given to the allegations.

In our opinion the complaint is plain and sufficient. The allegation of performance "of all the conditions" on plaintiff's part means, of course, the performance of all the obligations placed upon him by the contract during the period sued for, or perhaps up to the time suit was commenced. The complaint is silent as to whether or not plaintiff continued to perform after the last day of the period sued for, and whether he did or not was immaterial, in view of the further allegations of nonpayment of overdue instalments by the employer. It was, then, for the latter to advance with excuses for the apparent breach on its part or counterclaim for any default on the plaintiff's part.

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Our conclusion is that the complaint, properly construed, avers only performance during the period sued for. But, as said, if it did appear on the face of the complaint, as it does not seem to, that there was nonperformance thereafter, an excuse for such nonperformance is also set forth. The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

FREEDMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and a new trial ordered, with costs to appellant to abide event.

EDWARD J. MONIOT, Respondent, *v.* HENRY H. JACKSON, ADRIAN H. JACKSON, and STEPHEN H. JACKSON, as Executors of and Trustees under the Last Will and Testament of PETER A. H. JACKSON, Deceased, Impleaded, Etc., Appellants.

(Supreme Court, Appellate Term, March, 1903.)

Trustee — Not liable as such for his tort — Amendment of the complaint changing the nature of the cause of action.

Trustees, of an express trust in realty, charged with the duty of keeping the premises in repair, if liable at all for a failure to do so, can only be held as individuals.

Where a person seeks, but fails, to make out a case against executors and trustees for their alleged negligence as trustees in not keeping in a safe condition a grating, near a sidewalk in front of their premises, covering an excavation into which he fell, the court should not allow him to amend his complaint upon the trial so as to charge a nuisance, a different cause of action, and permit him to recover as for that.

APPEAL from a judgment of the City Court of the city of New York, in favor of the plaintiff, entered in the office of the clerk of the City Court of the city of New York, on the 14th day of November, 1902, upon the verdict of a jury for the sum of $378.13 damages and costs, and also from an order, entered in said clerk's office on the 11th day of November, 1902, denying the defendants' motion for a new trial made upon the minutes, on the ex-

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ceptions, and because the verdict was contrary to the evidence, contrary to law, against the weight of evidence, and for excessive damages.

Johnston & Johnston (Edward W. S. Johnston, of counsel), for appellants.

Joseph I. Green, for respondent.

GIEGERICH, J. This action was brought to recover damages for personal injuries. The complaint alleges that the appellants were executors and trustees under the last will and testament of Peter A. H. Jackson, deceased, and as such executors and trustees "were entitled to the possession of, and managed, directed, and controlled the premises known as No. 135 East 31st Street, Borough of Manhattan, New York City," and further alleged that the individual defendants were the beneficiaries and *cestuis que trust* of the trusts established by said last will and testament; that Lexington avenue and East Thirty-first street, in the borough of Manhattan and city of New York, were at all the times mentioned and still are public highways; "that the defendants *failed and neglected* to keep and maintain in proper and suitable condition and repair for the safe passage of pedestrians, *the sidewalks and gratings* in front of said premises * * * and that, on or about the 3d day of June, 1900, the said gratings and sidewalk were in an unsafe and dangerous condition, and of which defendants had due notice; that while the plaintiff was *lawfully upon the sidewalk* and *stepping upon the said gratings* in front of said premises *he was violently thrown into* an excavation *which was covered by the said grating* and seriously injured," etc.; and also "that the said injuries were caused and brought about solely through the *negligent, careless, wrongful, and unlawful conduct* on the part of the defendants, their agents and servants, and *without any fault, want of care or due diligence on the part* of the plaintiff."

The appellants (the executors) interposed an answer consisting of denials of the allegations of the complaint, and the individual defendants interposed another answer by another attorney. At the end of the plaintiff's case, the court, on motion of the individual defendants, dismissed the complaint as to them and all of

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them. The jury rendered a verdict in favor of the plaintiff and against the appellants for the sum of $250.

At the opening of the case the appellants' attorneys moved to dismiss the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, and also on the ground that the cause of action alleged against them in their representative capacity is for negligence, and for such negligence they were not liable, both of which were denied and the defendant-appellants excepted.

These motions were renewed at the close of the case and again denied, and the defendant-appellants excepted; and also on the further ground that there was no testimony showing any notice that the condition as testified to by plaintiff's witnesses had existed for any period of time prior to plaintiff's stepping upon the place; that the grating was not upon the sidewalk, but within the stoop line, and that there was no proof to sustain an action for negligence, which was the cause of action stated in the complaint, which was denied, and to this denial exception was taken.

The plaintiff's counsel, at the conclusion of the case, asked to be allowed to conform the pleadings to the proof in regard to the question of nuisance and to amend the complaint in that respect, which was granted, and to which the defendant-appellants duly excepted.

Under such circumstances we think no recovery against the appellants in their representative capacity can be maintained. Trustees of an express trust in real estate, where the will creating the trust imposes upon them the duty of keeping the premises in repair, are, by virtue of the legal title which is vested in them, liable, if at all, only personally, and not in their representative capacity, for a failure to keep the premises in repair. They are not even liable, in their representative capacity, for their contracts, except in two instances, where they are held liable in equity, but not at law — the first of these being where they have no funds in their hands, and they contract with some person to furnish materials or do work upon the trust estate, and the work or materials furnished is for the benefit of that estate, and they contract with such person so furnishing such work and materials not to become personally liable, but that such person may have a lien upon such trust estate for the value of such work or material, where such lien may be enforced, with the trustees and all their *cestuis que trust* before

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the court, against the real property; and the other instance is where the trustees themselves are insolvent, such lien may be enforced likewise against the trust property by a person so furnishing such materials or labor.

In no instance have executors or trustees been held liable in their representative capacity for their torts. Blum v. Dabritz, 39 Misc. Rep. 800; Keating v. Stevenson, 21 App. Div. 604; McCue v. Finck, 20 Misc. Rep. 506; Mulrein v. Smillie, 25 App. Div. 135; New v. Nicoll, 73 N. Y. 127; Rogers v. Wendell, 54 Hun, 542, 547; O'Brien v. Jackson, 167 N. Y. 31. In the latter case the defendant-appellants were the same that are now before the court, and the same will was in question.

Again, we are clearly of the opinion that no recovery should have been permitted for the nuisance, as was allowed in the court below, on a complaint charging negligence, and this is the only cause of action therein set forth. Ennis v. Myers, 29 App. Div. 382; Cottrell v. Dimick, 1 N. Y. St. Repr. 304; Fisher v. Rankin, 27 id. 584, 585; Maltbie v. Bolting, 6 Misc. Rep. 345; Jorgensen v. Ministers, 7 id. 3.

We also think the court below erred in granting the amendment to the complaint asked for after the testimony was all in. Under such circumstances the court had no power to amend the complaint, for it clearly changed the action from one cause to another, and the exception taken to this amendment was well taken. Fisher v. Rankin, 27 N. Y. St. Repr. 584, 585; Keating v. Stevenson, *supra;* Davis v. N. Y., L. E. & W. R. R. Co., 17 N. Y. St. Repr. 172; S. C., 110 N. Y. 646. This being our view of the law, it was clearly error to exclude the testimony offered by the defendants on the question of negligence.

The judgment should, therefore, be reversed and a new trial ordered, with costs to the appellants.

FREEDMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and a new trial ordered, with costs to appellants to abide event.

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ANNIE SCHOENFELD, an Infant, by ADOLPH SCHOENFELD, Her Guardian ad litem, Appellant, *v.* THE METROPOLITAN STREET RAILWAY CO., Respondent.

(Supreme Court, Appellate Term, March, 1903.)

Negligence — In starting a street car — Passenger holding on to hand-rail after the car started — Conduct of her escort in an emergency — Intervening superseding cause.

A street car conductor is guilty of negligence where he without any warning starts his car while a young girl, who has grasped the hand-rail with her right hand and has one foot on the step of the car, is trying to board it.

It is not negligent for her to keep hold of the hand-rail, where the car is proceeding rapidly, even though it causes her to be dragged half a block.

The fact, that her escort, who had been running after the car, then caught up with it and drew her from it, does not, if his negligence be imputed to her, make her negligent as matter of law, although he may not have exercised the best judgment in the emergency, and this rule is particularly applicable where it appears that substantially all her injuries were on her right side and were caused by her clinging to the hand-rail with her right hand.

The jury, and not the court, must determine whether any of her injuries were due to her escort's act, whether he acted rashly, and also whether his act amounted to an intervening cause superseding the effect of her own negligence, if any.

APPEAL from a judgment of the City Court of the city of New York, entered upon the dismissal of the complaint, directed by the court after a trial before it and a jury.

M. P. O'Connor (J. Brownson Ker, of counsel), for appellant.

Henry A. Robinson (F. A. Gaynor, of counsel), for respondent.

GIEGERICH, J. The action is brought to recover damages for personal injuries, alleged to have been caused by the defendant's negligence. The answer is a general denial and that the accident was due to the contributory negligence of the plaintiff.

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The testimony given for the plaintiff tended to show that at the time of the accident, which occurred about one o'clock in the morning on the 30th of September, 1901, the plaintiff, then nineteen years of age, was returning to her home in East Third street, near Avenue C, in the borough of Manhattan, New York city, accompanied by one Morris Levy and two other companions; that the party alighted from a Fourth avenue car, on which they had been passengers, at the corner of Stanton street and the Bowery, where they got transfers to the defendant's east-bound Stanton street car; that, after waiting there for about twenty minutes, such car came along while it was raining very hard; that the car stopped at the southeast corner, and, after two couples, who were not of plaintiff's party, had gotten on the car by the rear platform, the plaintiff, who was in advance of her party, started to board the car; that she grasped the hand-rail of the car with her right hand and had gotten one foot on the step when, without any warning to her, the conductor rang the bell and the car suddenly started forward, causing her to lose her balance, throwing her, as Mr. Levy testified, "behind the car rail," and dragged her for over half a block in the dirt and mud; Mr. Levy, in the meantime, running along with the car, trying to overtake it and calling to the conductor to stop. Finally, seeing that the conductor was not going to do so, he caught hold of the plaintiff and drew her from the car.

When the plaintiff rested, the complaint was dismissed, "because of the contributory negligence shown by the evidence against the plaintiff, and also of her escort," the trial court stating that the allegations of the complaint had not been sustained. The plaintiff took an exception, and, from the judgment entered upon such dismissal, she has appealed to this court. In considering whether the complaint should have been dismissed, the plaintiff is entitled to have the benefit of the facts most favorable to her which the jury would have been justified in finding upon the evidence. Smith v. Metropolitan Street Ry. Co., 7 App. Div. 253; Costello v. Third Ave. R. R. Co., 161 N. Y. 317. Applying this rule to the present case, it is clear that the trial court was not justified in dismissing the complaint.

The defendant was clearly negligent in not giving the plaintiff a reasonable time to board the car, and it cannot be held, as a matter of law, that the plaintiff was guilty of contributory neg-

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ligence in holding on to the hand-rail of the car, which the evidence shows moved rapidly, after it had been suddenly started and while she was being dragged along. Fay v. Metropolitan St. R. Co., 62 App. Div. 51. The plaintiff's position was perilous and how much longer she would have been able to retain her hold on the car is not disclosed. The evidence shows that the driver made no effort to stop the car, and that, unless some cause intervened, the plaintiff, in the natural course of things, would have been forced to loosen her hold and fall to the ground. The plaintiff was in imminent danger of serious injury, and, under the circumstances, it would not be fair to hold, as matter of law, that negligence may be imputed to her because of the effort which Mr. Levy made to rescue her.

I have not been able to find any case in this State directly in point. It has been held by the Pennsylvania courts, however (North Pennsylvania R. R. Co. v. Mahoney, 57 Pa. St. 187), that where a child was, for the purpose of protection, caught up in the arms of a person to whose care she had not been intrusted, and was, through that person's lack of presence of mind, injured by an engine which was being negligently backed through a crowded portion of a city, the railroad company was liable nevertheless, and that such act was not contributory negligence so as to discharge the latter. Even if Mr. Levy's act be imputable to the plaintiff, it was nevertheless for the jury, and not the trial court, to determine whether or not the act in question was one which would constitute rashness in the judgment of a prudent person. This is the rule where one, by the negligence of another, is so placed that he must choose, on the instant and in the face of grave and impending peril, between two hazards (Roll v. Northern Central R. Co., 15 Hun, 496; Twomley v. C. P. N. & E. R. R. Co., 69 N. Y. 158); and also where one voluntarily encounters imminent danger, caused by the negligence of another, for the purpose of preserving human life or saving another from apprehended serious injury. Eckert v. Long Island R. R. Co., 43 N. Y. 502; Manthey v. Rauenbuehler, 71 App. Div. 173. The principle underlying all these and similar cases is, that a person, who, through the negligence of another, finds himself in a position of danger, cannot be held guilty of contributory negligence for failure to act in the emergency in the best way to avoid the danger. Therefore, if an error of judgment by the plaintiff can-

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not defeat a recovery, then obviously a like error on the part of a third person should not have that effect.

If the conduct of such third person is material to be measured, no more should be required of him than of the plaintiff herself, and, extending the doctrine of the decisions above cited of courts of this State to the present case, it would seem that the defendant will not be absolved from responsibility unless the act of Mr. Levy in thus attempting to rescue the plaintiff from her perilous position was one which would constitute rashness in the judgment of a prudent person. This, however, was a question for the jury to determine. It was also for them to say whether or not any of the injuries complained of are the proximate result of the defendant's negligent act, or whether any of them were brought about by some intervening force or agency (Jacksonville, Tampa & Key West R. Co. v. Peninsular Land, Transportation & Manufacturing Co., 17 L. R. A. 33, 56); in other words, whether any of such injuries were due solely to Mr. Levy's act, and whether, under the circumstances, his act would be deemed an intervening cause, which would break the connection between the defendant's negligence and the injuries received, if any, after the plaintiff's hold upon the car was loosened. While it is true that an intervening cause may exonerate the defendant, yet it is not every intervening cause that will have this effect.

In Shearman & Redfield on Negligence (5th ed.), it is stated (§ 32): "In order to excuse the defendant, however, this intervening cause must be either a superseding or a responsible cause. It is a superseding cause, whether intelligent or not, if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury. It is a responsible one, if it is the culpable act of a human being, who is legally responsible for such act. The defendant's negligence is not deemed the proximate cause of the injury, when the connection is thus actually broken by a responsible intervening cause. But the connection is not actually broken, if the intervening event is one which might, in the natural and ordinary course of things, be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation. Of course, the very definition of a superseding cause implies that the defendant's negligence cannot be the cause of the injury."

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As a result of the foregoing considerations, it is clear that the trial court erred when it imputed, as matter of law, negligence to the attempt of Mr. Levy to extricate the plaintiff; but, aside from this, it appears from the record that substantially all the injuries received by the plaintiff were on her right side, and were caused by being dragged along while clinging to the hand-rail of the car with her right hand. For these, the plaintiff, if ultimately successful, would, in any event, be entitled to a fair and reasonable compensation.

It follows from these views that the plaintiff's evidence was sufficient to carry the case to the jury, and, therefore, the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

FREEDMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

Matter of the Summary Proceeding Brought by THE STUYVESANT REAL ESTATE CO., Landlord, on the Petition of FREDERICK E. MYGATT, Agent of Said Landlord, *v.* MARY E. SHERMAN, Tenant, and JOHN DOE and RICHARD ROE, Etc., Undertenants.

(Supreme Court, Appellate Term, March, 1903.)

Summary proceedings — Verification of a petition by a domestic corporation — Code Civ. Pro., §§ 525, subd. 1; 2235 — Jurisdiction of Municipal Court assailable for the first time on appeal — Jurisdictional defect in an allegation of the service of a demand for rent or possession — Code Civ. Pro., § 2240.

An agent of a domestic corporation may, and an officer thereof need not, verify its petition to initiate summary proceedings to dispossess its tenant.

A question which affects the jurisdiction of the Municipal Court of the city of New York may be raised for the first time on an appeal to the Appellate Term of the Supreme Court.

The said Municipal Court does not acquire jurisdiction of such proceedings where the petition therein, although stating that the tenant was served with a three days' notice to pay rent or yield

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possession "as prescribed in chapter 17, title 2, section 2240 of the Code of Civil Procedure, for the service of a precept," fails to state by which of the three methods, prescribed in said section, service was made.

APPEAL by the landlord from a final order made in the Municipal Court of the city of New York, eighth district, borough of Manhattan, dismissing a summary proceeding, brought to recover possession of demised premises for nonpayment of rent.

Van Wyck, Mygatt & Burnham, for appellant.

Wentworth, Lowenstein & Stern, for respondent.

FREEDMAN, P. J. Upon the return day of the precept issued in this proceeding the attorney for the tenant made a motion to dismiss the landlord's petition herein on the ground that said petition was not verified by an officer of the company, which is a domestic corporation, as required under sections 2235 and 525 of the Code of Civil Procedure.

This motion was granted, and from the order dismissing the proceeding, this appeal is taken.

The petition in this case was made by one Frederick E. Mygatt, who alleges therein that "he is the agent of the Stuyvesant Real Estate Company; * * * that said company is a domestic corporation and is the owner in fee and the landlord of the demised premises."

This petition is verified by Mygatt in the usual form and the claim is made that because section 2235 of the Code of Civil Procedure provides that the petition in summary proceedings must be verified in "like manner as a verified complaint in an action brought in the supreme court," and section 525, subdivision 1 of the Code of Civil Procedure provides that: "Where the party is a domestic corporation, the verification must be made by an officer thereof," that the petition in this case not having been verified by an officer of the company, the court below had no jurisdiction and this was the view taken by the trial judge. This claim is untenable. Section 525 has reference solely to pleadings in an action, and has no application to petitions in summary proceedings. The phrase "a written petition verified in *like manner* as

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a verified complaint * * * in the supreme court," contained in section 2235, has reference only to the form of the verification, and not to the individual who verifies it. That section expressly authorizes the agent of the landlord to make the application (Powers v. De O., 64 App. Div. 373), and provides that the applicant must present to the judge or justice a written petition verified in "like manner," etc., which means in like form as pleadings are verified. No other construction can reasonably be placed upon the language of that section. "Manner" means method of procedure — habit or custom. It follows, therefore, that the motion to dismiss on that ground should not have been granted.

The respondent raises another question, however, which, as it involves a question of jurisdiction of the court below, must be considered, although raised for the first time on appeal.

The petition alleges that after all the rent became due "a three days' notice in writing requiring in the alternative the payment of said rent or the possession of the said premises, was served in behalf of the said landlord, the person entitled to the said rent, upon the said tenant, the person owing it, as prescribed in chapter 17, title 2, section 2240 of the Code of Civil Procedure, for the service of a precept."

There are three methods prescribed by section 2240 of the Code for the service of a precept. If the precept is served in a manner prescribed in either of the subdivisions of the section, it constitutes a service upon the tenant. The allegation of the petition is that the demand for rent was served upon the tenant. There is nothing in the petition to indicate in which of the three methods indicated, the tenant was so served.

This question has been passed upon in several cases, notably People ex rel Morgan v. Keteltas, 12 Hun, 67; Tolman v. Heading, 11 App. Div. 264; Boyd v. Milone, 24 Misc. Rep. 736; in all of which the contention of the respondent has been upheld. In these proceedings the statute must be strictly followed to confer jurisdiction upon the court to entertain them. Beach v. McGovern, 41 App. Div. 381.

The order dismissing the proceeding must, therefore, be affirmed.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Order affirmed, with costs.

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SAMUEL ROGOW and JOSEPH GOLD, Appellants, *v.* LOUIS CLARK, Respondent.

(Supreme Court, Appellate Term, March, 1903.)

Municipal Court of the city of New York — Construction of L. 1902, ch. 580, § 68, as to discharge from arrest — Subsequent issue of an execution against the body — Code Civ. Pro., § 572, inapplicable to Municipal Court.

Where a plaintiff, who in Oct., 1902, procured an order of arrest in an action in the Municipal Court of the city of New York and thereafter recovered judgment against the defendant, fails to take out an execution upon the judgment before the expiration of twenty-four hours after he was entitled to the judgment, the defendant, although he has given bail, is entitled to his discharge under L. 1902, ch. 580, § 68.

His discharge does not defeat the right of the plaintiff to the subsequent issue of a body execution upon the judgment, in the form prescribed by L. 1902, ch. 580, § 271.

Code Civ. Pro., § 572, does not apply to the Municipal Court and, therefore, its concluding provision that "A defendant discharged as prescribed in this section shall not be arrested upon an execution issued upon the judgment in the action" has no application to the matter.

APPEAL by the plaintiffs from an order made in the Municipal Court of the city of New York, second district, borough of Manhattan, discharging the defendant from arrest and providing that no body execution should issue exonerating the sureties on defendant's bail bond.

Gustavus A. Rogers, for appellants.

Herman S. Fried, for respondent.

FREEDMAN, P. J. The question involved in this case is the construction of the last clause of section 68 of chapter 580, Laws of 1902, known as the Municipal Court Act, and arises from the following state of facts:

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On October 20, 1892, the defendant was arrested pursuant to an order of arrest obtained herein by the plaintiffs, and upon the same day admitted to bail. On November 7, 1902, the case was tried and judgment rendered in favor of the plaintiffs for the sum of $197 damages and costs, which judgment provided that the defendant be subject to arrest and imprisonment. Upon November 28, 1902, the defendant made a motion that he be discharged from arrest, upon the ground that more than twenty-four hours had elapsed since the judgment herein was rendered, and no execution had been issued. The motion was granted and an order entered which directed "that the defendant be discharged from arrest under the order of arrest granted in this action on the 20th day of October, 1902, and that no body execution issue against him upon the judgment."

Section 68 of chapter 580, Laws of 1902, reads as follows: "A defendant, arrested as prescribed in this article, may, without notice, upon the appearance of the plaintiff before the court, or at any time afterwards before judgment, upon two days' notice given personally to the plaintiff, or to his agent or attorney who appeared for him before the court, apply to the court for an order, discharging him from arrest. The application may be founded upon the papers upon which the order of arrest was granted, and upon the complaint, if it has been made. * * * The court must also, upon the defendant's application, grant an order discharging him from arrest, if the plaintiff fails to take out an execution, upon a judgment in his favor, before the expiration of twenty-four hours after he is entitled thereto." The commissioners' note to this section (Collin's Mun. Ct. Pr. 65) states that "the foregoing is substantially section 2901 of the Code, except twenty-four hours instead of one hour." As before stated the defendant was arrested and gave bail. At the time the judgment was entered and at the time the motion to vacate the order of arrest was granted, he was constructively under arrest by virtue of the order issued herein. By giving bail he was practically transferred from the custody of the marshal to the custody of his sureties, who could surrender him at any time. It is conceded that no execution was issued within ten days after the entry of judgment herein, and therefore the defendant was entitled upon his motion to be discharged from the order of arrest, and to that extent the decision of the trial court was correct.

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It is also claimed by the defendant that by virtue of the provisions of section 20 of the new Municipal Court Act, section 572 of the Code of Civil Procedure is made applicable to proceedings in the Municipal Court, and that as the last clause of section 572 provides that: "A defendant discharged as prescribed in this section shall not be arrested upon an execution issued upon the judgment in the action," the defendant is exempt from future arrest upon an execution issued against the body, and was entitled to have the judgment herein amended or modified by striking out the clause authorizing such an execution. In this the respondent is in error. Section 572 applies only in the Supreme Court. In actions in the Supreme Court, where the defendant is liable to arrest upon a judgment an execution must be first issued against the property of the judgment debtor and returned unsatisfied. Then an execution may be issued against the person. If the execution against the person be not issued within ten days after the return of the unsatisfied property execution, the defendant must "be discharged from custody if he has already been taken under the mandate against him in such action, or if he has not been imprisoned therein, be relieved from imprisonment by virtue of such mandate." "A defendant discharged *as prescribed in this section,* shall not be arrested upon an execution issued upon the judgment in the action." In an action in the Municipal Court, when the defendant is liable to arrest and imprisonment under the judgment obtained, but one execution is issued. Such execution requires the officer executing the same to collect the amount thereof out of the personal property of the judgment debtor if possible, if not, then to arrest the defendant. New Municipal Court Act, section 271. Section 272 provides that: "When the execution directs the arrest of the defendant for want of sufficient personal property, * * * the officer may, without further delay, arrest the defendant," etc. The plaintiff in an action in the Municipal Court can, therefore, have but one execution in form as above stated, and he must, under the provisions of section 68, *supra,* take out that execution before twenty-four hours have elapsed after he is entitled to judgment, otherwise the defendant must be discharged. Section 572, *supra,* therefore, cannot be construed as referring to Municipal Court actions. It is equally evident that the provisions of section 68 of the Municipal Court Act have reference only to the order of arrest under which

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the defendant is either actually or constructively imprisoned, and does not relieve the defendant from arrest and imprisonment, in default of property, under the execution which may be issued upon a judgment authorizing such arrest. As before stated, section 68 of the new Municipal Court Act is section 2901 of the Code of Civil Procedure, with the change extending the time for the issuance of an execution from one hour to twenty-four hours. Section 2901 is followed by section 2902, which provides that "His (defendant's) discharge from arrest, after judgment, as prescribed in the last section, does not affect the execution." This can refer to but one execution, as but one execution is issued upon such a judgment, and it cannot, therefore, be said that such clause refers to an execution against the property and not to an execution against the person. The respondent refers to the provisions of the Code of Civil Procedure, which prescribe the practice in Justices' Courts, as the "Justices' Court Act," as distinguished from the Code. Those provisions are not and never were designated as the "Justices' Court Act." They are as much a part of the Code of Civil Procedure as those provisions referring to the Supreme Court or the City Court. The practice in Justices' Courts and in Municipal Courts are similar in many respects, and prior to the passage of the new Municipal Court Act, those sections of the Code which were intended to apply to Municipal Court practice were made so by being specifically designated. The new Municipal Court Act has, however, by section 20, *supra,* made the general provision that: "The provisions of the code of civil procedure * * * shall apply to the municipal court as far as the same can be made applicable." Section 2902, therefore, being consistent with the intent and practice in Municipal Courts, is applicable and can be read in as part of such new act.

It was, therefore, error for the court below to direct that the provision in the judgment herein authorizing the issuing of a body execution should be stricken out.

The order must be modified by affirming that portion which discharges the defendant from arrest and reversing that part which strikes out the clause in the judgment herein authorizing the issuing of an execution against the person of the defendant.

Order affirmed as to that part which discharges the defendant from arrest, and reversed as to that portion which strikes out from the judgment the direction that the defendant is liable to

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arrest and imprisonment, and, as modified, affirmed, without costs to either party on this appeal.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Order affirmed as to part which discharges defendant from arrest, and reversed as to portion which strikes out from judgment, direction that defendant is liable to arrest, and, as modified, affirmed without costs to either party on this appeal.

LOUIS BERMAN et al., Respondents, *v.* CARL H. SCHULTZ, Appellant.

(Supreme Court, Appellate Term, March, 1903.)

Negligence — Intervening act of third parties as the proximate cause of a collision.

The act of little boys, in turning the starting lever of an electric truck left standing at rest in a public street by its operator with the power off and the brake on while he was making a delivery of goods to a customer, thereby causing the truck to start down the street, uncontrolled, and collide with a horse and wagon, must be deemed the proximate cause of the collision, and, as the intervening act of third parties, exempts the owner of the truck from liability to the owner of the horse and wagon.

APPEAL by the defendant from a judgment rendered in favor of the plaintiffs in the Municipal Court of the city of New York, fourth district, borough of Manhattan.

Hansen, Zinsser & Power, for appellant.

Isidor Cohn, for respondents.

FREEDMAN, P. J. The action was brought to recover for damages for injuries to plaintiffs' horse, wagon, and harness, by reason of the alleged negligence of the defendant. Plaintiffs recovered a judgment for the sum of $100 damages and costs. The alleged cause of action arose out of the following circumstances:

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At the time of the accident the plaintiffs' horse and wagon were standing unattended at the southeast corner of Ninety-eighth street and Third avenue. The defendant was the owner of an electric automobile delivery truck. The truck was used to carry mineral and seltzer water for delivery to defendant's customers. The driver of the truck left it standing in front of No. 114 East Ninety-eighth street while he went into the house to deliver some mineral water to a customer. When he came out the machine was at Lexington avenue, running rapidly in an easterly direction, toward Third avenue. Before he caught up with it, it collided with the plaintiffs' horse and wagon, causing the injuries complained of. The defendant proved that the automobile was one of the best in the market and in perfect order at that time. The driver was an experienced man and a competent chaffeur, thoroughly acquainted with the workings of an electric automobile. Before leaving the machine he threw off the current, put on the brake fast so that it could not start of its own accord. Two disinterested witnesses testified that, while the machine was standing still and the operator was in the building, two boys apparently about ten years of age were seen looking around the truck, and suddenly one of them reached into the machine and pulled the starting lever, and the automobile began to run down the street, increasing in speed as it went along. This testimony was undisputed, and the testimony given by these witnesses as to their location and the circumstances under which they saw the occurrence testified to by them leaves no reason to doubt their evidence. It has been frequently held that where the proximate cause of the injury complained of is the intervening act of a third party the defendant is not liable. Mars v. D. & H. R. R. Co., 54 Hun, 625; Thompson v. Plath, 44 App. Div. 291; Laidlaw v. Sage, 158 N. Y. 73. Upon the state of facts disclosed by the testimony herein the defendant was not liable, and the judgment must be reversed.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

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BERNHARD BUCKLE and CARL WESTERMAN, Respondents, v. JULIUS C. ILER and JOSEPH D. ILER, Defendants, JOSEPH D. ILER, Appellant.

(Supreme Court, Appellate Term, March, 1903.)

Limited partnership — A failure to file proof of the publication of the certificate and affidavit imposes no liability.

A failure to file, with the proper county clerk, proof of the publication of the certificate and affidavit, required by the Partnership Law (L. 1897, ch. 420, §§ 30, 31, 32) to be made, filed and published in the case of a limited partnership, does not make a special partner therein a general partner, and this because the statute imposes no penalty or liability for the failure, and besides it cannot prejudice creditors.

APPEAL by the defendant Joseph D. Iler from a judgment rendered in favor of the plaintiffs in the Municipal Court of the city of New York, first district, borough of Manhattan.

George Q. Collins (Geo. W. Van Slyke, of counsel), for appellant.

Rabe & Keller, for respondents.

FREEDMAN, P. J. There is but one question raised upon the appeal in this case.

The action was brought to recover for goods sold to the firm of J. C. Iler & Co., and the plaintiffs secured a judgment for $194.10 and costs. The defendant Joseph D. Iler set up, as a special defense, that he was not liable upon the cause of action, on the ground that he was a special partner under the Limited Partnership Act. The appellant proved the formation of the limited partnership; that he was the special partner therein, and the payment in cash of the sum contributed by him, as agreed upon, into the partnership. It was conceded by plaintiffs upon the trial that appellant had caused to be published the requisite certificate and affidavit pursuant to the order of the county clerk.

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It was then conceded by the appellant that no *proof of publication* of such certificate and affidavit, as required by the statute, had been *filed* with the county clerk. The statute (Laws 1897, chap. 420, § 32) provides as follows: "Immediately after the filing of the certificate, a copy of the same or a notice containing the substance thereof, shall be published once in each week for six successive weeks, in two newspapers of the county in which such original certificate is filed, to be designated by the county clerk, one of which newspapers shall be a newspaper published in the city or town in which the principal place of business is intended to be located, if a newspaper be published therein; or, if no newspaper is published therein, in the newspaper nearest thereto, and *proof of such publication* by affidavit of the printer or publisher of each of such newspapers *must be filed* with the original certificate."

It is contended by the plaintiffs that, by reason of the failure of the appellant to file with the county clerk proof of the publication of the certificate referred to in section 32 aforesaid, the appellant became liable as general partner for all debts contracted by the firm, and that, therefore, judgment in favor of the plaintiffs herein must be sustained.

A reading of the statute shows that for each of several acts or omissions a liability has been imposed. These acts or omissions are enumerated in sections 34, 35, 37, 39, 40, and 41 of the act. These briefly stated are as follows: (1) False statement in the certificate or affidavit; (2) failure to publish certificate or affidavit; (3) or renewal or continuance of partnership in another manner than prescribed by the statute; (4) use of name of special partner in firm name without his privity; (5) interference in the business contrary to the provisions of section 37; (6) violation of section 40, relating to transfers of property by partners. But nowhere does the statute impose liability for failure to file proof of publication of the certificate. We may, therefore, reasonably assume that had it been the intention of the Legislature to impose a penalty or create a liability for such failure as above mentioned, it would have so declared in express language. In fact the contrary intention may more reasonably be inferred, for while the act requires the certificate to be published, and prescribes the penalty or liability as general partner for failure to publish, and also requires proofs of such publication to be filed, it omits any penalty

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for failure to file. The publication is the protection to the public, and for failure to publish the act justly makes a special partner liable as a general partner, but the failure to file proof of publication can in no way prejudice the rights of creditors of a limited partnership.

The failure to perform an act required by the statute will not impose liability of a general partner upon the special partner unless the statute so declares. This was substantially so decided in Buck v. Alley, 145 N. Y. 488.

Judgment as to appellant, Joseph D. Iler, reversed, and a new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment as to appellant, Iler, reversed and new trial ordered, with costs to appellant to abide event.

WILLIAM WALLACE, Respondent, *v.* GEORGE HARRIS et al., Appellants.

(Supreme Court, Appellate Term, March, 1903.)

Municipal Court of the city of New York — Time within which judgment must be rendered.

In an action in the Municipal Court of the city of New York begun before, but tried after, the Municipal Court Act (L. 1902, ch. 580) went into effect on Sept. 1, 1902, the justice has fourteen, and not eight, days, after the final submission of the action, within which to render judgment.

APPEAL by the defendants from a judgment entered in the Municipal Court, eighth district, borough of Manhattan, in favor of the plaintiff.

Alexander La Mont, for appellants.

Palmer & Somerville, for respondent.

FREEDMAN, P. J. All the disputed questions of fact in this case have been disposed of by the trial judge and we see no reason for disturbing his decision thereon.

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The appellants strenuously claim, however, that the judgment should be reversed upon the ground that the action having been commenced before the new Municipal Court Law, chapter 580, Laws 1902, took effect, the judgment should have been rendered within eight days after final submission, and not within fourteen, as prescribed under the new law, although it is conceded that the trial did not take place until after the new act took effect. In this position we think the appellants are wrong. The new Municipal Court Act, section 361, provides that the repeal of any law specified therein shall not affect or impair any act done or right accruing, accrued or acquired, and that all actions and proceedings commenced under or by virtue of the laws so repealed and pending September 1, 1902, may be prosecuted in the same manner, and with the same effect, *unless it shall be otherwise specially provided.*

Section 230 provides that the court must hear the evidence and decide all questions of law and fact and render judgment accordingly within fourteen days from the time the same is submitted for that purpose; so that there is a special provision regarding the time which the court may have in which to decide the questions submitted. Section 362 also provides that the provisions of the act "so far as they are substantially the same as those of laws existing prior to September 1st, 1902, shall be construed as a continuation of such laws, modified or amended, according to the language employed in this act, and not as a new enactment."

The effect of this section is, therefore, the same as though the old Greater New York Municipal Court Charter Act, chapter 378, Laws of 1897, as amended by chapter 466, Laws of 1901, requiring Municipal Court justices to render judgment within eight days after submission, had been amended, to take effect September 1, 1902, extending such time to fourteen days.

Judgment affirmed, with costs.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment affirmed, with costs.

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JOHN FINCK, Appellant, *v.* JOHN BAUER, Respondent.

(Supreme Court, Appellate Term, March, 1903.)

Action for broker's commissions — Default of his principal — Party wall as an incumbrance — Parol evidence.

A sealed agreement, binding adjoining owners, their heirs and assigns, one of whom has no easterly wall to his house and only a right to support its beams in the wall of the adjoining house, providing that, if the latter wall shall be destroyed by fire or become unsafe, both owners will at their joint expense construct a new wall, the same to be a party wall and stand one-half on the land of each, constitutes a covenant running with the lands and is an incumbrance on each lot.

Therefore, where the owner of the house, which has no easterly wall, employs a broker to get him a loan on that house and agrees with the broker to furnish a title "free and clear from all incumbrances," the broker, upon procuring a person able and willing to make the loan, has earned his commissions and his principal is in default as he has failed to furnish the title he agreed to furnish.

Parol evidence is inadmissible to contradict a sealed instrument.

APPEAL by the plaintiff from a judgment rendered in favor of the defendant in the Municipal Court, sixth district, borough of Manhattan.

William R. Bronk, for appellant.

George M. S. Schulz, for respondent.

FREEDMAN, P. J. There is no dispute as to the material facts in this case. The action was brought by the plaintiff to recover the sum of $100 as commissions for procuring a loan of $5,000 upon premises owned by the defendant. The contract between the parties was in writing, under seal, and by its terms the defendant employed the plaintiff as his broker to procure a loan of the amount above stated, agreeing to pay 2 per cent. therefor, and also for drawing bond and mortgage, etc. The contract con-

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tained this clause: "It is further understood that I am to furnish a title, in fee simple, free and clear from all incumbrances and one that will be satisfactory to the attorneys of John Finck." The plaintiff procured the acceptance of the required loan by one Fitch, who was able, ready and willing to make the same and to take the bond and mortgage. Upon examination of the title, it was discovered that the building, standing upon the premises, had no easterly wall, and that defendant had only a right to use the wall, of the building adjoining, as a support for the beams of his house. The right was evidenced by two written sealed instruments, duly acknowledged and recorded. The first of these instruments provided that "whenever said wall shall cease to exist the said parties hereto mutually agree that they will then build a party-wall at their joint expense, one-half of such wall to stand on the ground of each party, each of said parties to stand one-half of the expense of building such wall, but this clause shall not be binding upon either party in case he shall sell his said property before said wall is destroyed." The second and subsequent agreement contained this clause: "That upon the destruction of said wall by fire, or if by lapse of time the same shall become unsafe and unfit for use to support the beams therein inserted, the parties to this agreement, or those claiming under them, shall proceed to build a party-wall, one-half thereof to stand on the land of each party and at joint expense, and the said agreement and this amendment thereto shall bind said parties, their heirs and assigns."

This agreement was executed by Richard G. L. Dieffenbach and John Sexton, then the owners of adjoining lots, and the defendant's wife acquired title to the premises in question from Sexton. Nothing was said, in the agreement by the defendant with the plaintiff, relative to the walls of the house nor the beam right — the materials, size and use of the building, and size of the lot, only being given.

The only question to be determined in this case is whether or not this agreement made by the defendant's grantor was an incumbrance on the premises. If so the defendant failed to furnish to the plaintiff a title "free from incumbrances," the plaintiff earned his commissions and was entitled to judgment herein. In support of the proposition that a party-wall is not an incumbrance, the respondent cites Hendricks v. Stark, 37 N. Y. 106, and Mohr v. Parmelee, 43 N. Y. Super. Ct. 320. These cases are similar in

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application and are distinguished in O'Neil v. Van Tassel, 137 N. Y. 297, cited in Schaefer v. Blumenthal, 169 id. 221, reversing the same case in 51 App. Div. 517. In O'Neil v. Van Tassel, *supra,* it was held that a party-wall, existing by virtue of a perpetual covenant running with the land, was an incumbrance. The condition of the beam right held by the defendant's grantor obligated his *heirs* and *assigns,* if at any time the wall upon the adjoining premises should be destroyed by fire or by lapse of time the same should become unsafe or unfit to support the beams, the parties to the agreement or "*those claiming under them*" should build a party-wall one-half thereof on the lands of each party and at joint expense. This contract placed a burden upon the land of the defendant; he was obliged to, and might be called upon at any time to, devote a certain portion of his premises upon which to build a party-wall. It was a covenant running with the land and hence an incumbrance. 137 N. Y., *supra.* The defendant was allowed to prove upon the trial, over objection by the plaintiff and exception taken to the ruling of the court, that, when the defendant called upon the plaintiff's representative to sign the contract for the loan, he informed said representative of the existence of the beam right. This was denied by the agent of the plaintiff but the court below evidently believed the testimony, for, upon no other testimony, could he have based his decision dismissing the complaint. The admission of this testimony was clearly error. It was testimony tending to contradict the terms of a written instrument, and the rule regarding such testimony is too well known to require citation of authority in its support. Under the undisputed evidence in the case the plaintiff was entitled to judgment.

Judgment reversed and new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed, and new trial ordered, with costs to appellant to abide event.

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RICHARD JONES, Respondent, v. STANLEY E. KEELER, Appellant.

(Supreme Court, Appellate Term, March, 1903.)

Foreign stock corporation — When it may sue without a certificate of authority because not "doing business in this State" — Powers of a salesman — Accord and satisfaction.

A foreign stock corporation, having no office or place of business in the State of New York, which, by its traveling salesmen, solicits orders in this State not to become binding until sent to and approved by the home office, is not "doing business in this State" within the meaning of the statute (L. 1901, ch. 538) forbidding a foreign stock corporation, or its assignee, doing business here, from suing here upon a contract made here unless it has first procured from our Secretary of State a certificate of authority, as described in the statute.

A traveling salesman cannot bind his corporation by his promise to pay a person commissions on a sale to a third person provided the promisee will help the salesman to effect the sale.

Where, after a genuine dispute has arisen, between a vendor and a vendee, as to the amount due on the sale, the vendor accepts, retains and uses the vendee's check, for a smaller sum, stated on its face and in an accompanying letter and statement of account to be in full for the goods sold, there is an accord and satisfaction which concludes the vendor.

APPEAL by the defendant from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, first district, borough of Manhattan.

Eustace Conway, for appellant.

Sumerwell, Shoup & Vermilya, for respondent.

GILDERSLEEVE, J. Judgment was rendered in the court below in favor of the plaintiff and against the defendant for $210 and costs. The defendant had purchased from plaintiff's assignor, on December 6, 1901, a quantity of lumber, and was indebted therefor in the sum of $238.49.

The plaintiff's assignor, the Whiting Lumber Company, is a corporation organized and existing under the laws of the State of

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Tennessee. It is the claim of the defendant that, as the Whiting Lumber Company had never procured the necessary certificate permitting it to bring suit in this State upon a contract made in this State, it is prohibited from bringing this action by reason of chapter 687 of the Laws of 1892, as amended by chapter 538 of the Laws of 1901. The sale of lumber in question was made by one Casselbury, a traveling salesman representing the Whiting Lumber Company. Casselbury took the order of the defendant in the city of New York, and transmitted it to the home office of his principal in Elizabethtown, Tenn., where it was accepted and approved, and thereupon the said lumber was shipped and delivered to the defendant. The Whiting Lumber Company had no office or other place of business in the State of New York. It simply solicited orders, by agents or traveling salesmen, which were sent to its home office in Elizabethtown, Tenn., and the acts of the salesmen and agents did not become binding contracts until accepted and approved by the Whiting Lumber Company. Such a transaction does not constitute "doing business within this State," within the meaning of the statute. See Tallapoosa Lumber Co. v. Holbert, 5 App. Div. 559; National Knitting Co. v. Bronner, 20 Misc. Rep. 125; People ex rel. Cotton Oil Co. v. Roberts, 25 App. Div. 15; Vaughn Machine Co. v. Lighthouse, 64 id. 141. The action may be maintained.

The principal objection of the defendant to the validity of the judgment arises from an alleged counterclaim set up by the defendant, amounting to the exact sum of $210, which, the defendant asserts, the court should have allowed. It appears that Casselbury, the assignor's agent who made the sale to the defendant, while in defendant's office in the city of New York, promised the defendant that, if the sale of a quantity of oak flooring was made to Stevens & Son, by his principal, the defendant should have three dollars a thousand by way of commission. The sale was made to Stevens & Son, and the commission amounts to $210. The Whiting Lumber Company had not previously sold lumber to Stevens & Son, and the latter were ignorant of the arrangement between Casselbury and the defendant as to commissions, nor did the Whiting Lumber Company have any knowledge of the said agreement. It is the claim of the assignor of plaintiff that this alleged agreement was not brought to its attention until the beginning of this suit. On the other hand, the defendant asserts

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that the assignor had, not only constructive, but actual notice. The actual notice alleged consists of a letter, exhibit 2, annexed to the agreed statement of facts, written by defendant to plaintiff's assignor, on December 13, 1901, about the time of the delivery of the oak flooring to Stevens & Son. After referring in this letter to other transactions the defendant says: "Your Mr. Casselbury was trying to sell me some short oak flooring, and seemed very anxious to do so, and asked me to call up my party, which I did in his presence, he hearing the person's name and telephone number, and at that time the party who did the buying was out of the city on an automobile excursion. Mr. Casselbury stayed here longer than he anticipated and took advantage of the party named, and went up and sold the lumber direct. If you consider this fair and honest business, all right, but I don't." It will be observed that this letter contains no reference to the alleged promise made by Casselbury as to commissions, nor in it is any claim made upon the Whiting Lumber Company for commissions. Under the facts established by the admissions and evidence, it must be held that the alleged agreement between Casselbury and defendant was not binding on the Whiting Lumber Company. Casselbury was a traveling salesman and had no authority to make agreements for the giving of commissions. No such agreement was ever adopted or confirmed by the Whiting Lumber Company. The defendant knew very well that Casselbury was simply a traveling salesman for the Whiting Lumber Company, and was not justified in relying upon Casselbury's assumption of authority. If defendant did rely upon Casselbury's statement, he did so at his own risk. 1 Am. & Eng. Encyc. of Law (2d ed.), 987.

Even accepting this view of the nonliability originally of the corporation on this agreement made by Casselbury, it is nevertheless claimed by defendant that plaintiff should not prevail for the reason that there was an accord and satisfaction. The precise amount claimed to be due to the Whiting Lumber Company, from defendant at the time the difference arose between it and defendant, was $239.49. On January 7, 1901, defendant informed Mr. Whiting, president of the corporation, in an interview, of his claim; Mr. Whiting refused to allow it. The defendant on March 25, 1902, sent to the Whiting Lumber Company his check for $28.49, the difference

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between the unpaid balance due on the lumber and the $210 the defendant claimed by way of commission. On this check the defendant wrote the following: "In full payment of car No. 6423." This was the number of the car upon which the assignor of plaintiff shipped the lumber to defendant. The Whiting Lumber Company kept this check. The letter above mentioned of March twenty-fifth, from defendant to plaintiff's assignor, was as follows, viz.: "Inclosed please find statement of account and also my check to balance same." The statement contained these words: "Less $3 per M on 70 M feet of oak flg sold to H. E. Stevens & Son by Mr. Casselbury, your former salesman." It appears that the check bears the indorsement of the "Whiting Lumber Company, F. R. Whiting, Prest," and underneath this indorsement the following: "Pay to American Exchange Nat'l Bank or order, Sumerwell, Shoup & Vermilyea." The check is made payable to the Whiting Lumber Company. The check is dated "New York, March 24th, 1902," and on the back appears the following: "Received payment per New York Clearing House, Apr. 3, 1902, Am. Ex. Nat'l. Bk, E. Burns, Cash." When the respective indorsements by the Whiting Lumber Company and Sumerwell, Shoup & Vermilyea were made, does not appear. The action was commenced on April 11, 1902, after the check had been paid.

In the case of Fuller v. Kemp, 138 N. Y. 231, it was held that "Where a debtor offers a certain sum of money in full satisfaction of an unliquidated demand, and the creditor accepts and retains the money, his claim is cancelled, and no protest, declaration or denial on his part, so long as the condition is insisted upon by the debtor, can vary the result." In the case of Nassoiy v. Tomlinson, 148 N. Y. 326, we find the following: "A demand is not liquidated, even if it appears that something is due, unless it appears how much is due; and when it is admitted that one of two specific sums is due, but there is a genuine dispute as to which is the proper amount, the demand is regarded as unliquidated, within the meaning of that term as applied to the subject of accord and satisfaction. If, when the amount of an indebtedness is in dispute, the debtor sends the creditor a check for the sum conceded by the debtor to be due, with an unsigned receipt 'in full,' and a letter requesting the signing and return of the voucher, the offer of payment is to be deemed made upon the

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condition of its acceptance in satisfaction of the debt; and if the creditor retains the papers, and, after claiming a larger sum, and the refusal of the debtor to pay anything more, indorses and collects the check, such acceptance of the check imports an election to be bound by the condition on which it was offered, and constitutes an accord and satisfaction which will not be affected by the creditor's subsequently sending the debtor a receipt 'on account,' unless such receipt is acquiesced in by the debtor." The doctrine laid down in these two cases is somewhat limited by the case of Eames Vacuum Brake Co. v. Prosser, 157 N. Y. 290. The rule is there laid down as follows: "Ordinarily, the retention of a check inclosed in a letter which refers to the amount as the balance due on accounts between the parties will not be held to be an accord and satisfaction so as to bar an action for the balance due. It is only where a dispute has arisen between the parties as to the amount due, and a check is tendered on one side in full satisfaction of the matter in controversy, that the other party will be deemed to have acquiesced in the amount offered by an acceptance and retention of the check."

In the case at bar, there was a genuine dispute as to which one of the two sums was due, and the defendant sent his check for the amount which he claimed to be due, and stated that it was in full payment of the account. The creditor, to-wit, the plaintiff's assignor, received the check, did not return the same to the defendant, nor reply to the accompanying letter and statement of defendant, but indorsed the check and got the money thereon, before the service of the summons in this action. This constitutes an accord and satisfaction, within the meaning of the case of Eames Vacuum Brake Co. v. Prosser, above quoted.

It must be held, therefore, that notwithstanding the original nonliability of the corporation on the agreement made by Casselbury, there was an accord and satisfaction, and the plaintiff was not entitled to recover.

The judgment is reversed and a new trial granted, with costs to appellant to abide the event.

FREEDMAN, P. J., and GIEGERICH, J., concur.

Judgment reversed and new trial granted, with costs to appellant to abide event.

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ATHANASIOS P. VAN VALIS, Respondent, *v.* JOHN P. CHARCONA, Appellant.

(Supreme Court, Appellate Term, March, 1903.)

Municipal Court of the city of New York — Jurisdiction lost by a justice unless he files his decision within fourteen days.

A justice of the Municipal Court of the city of New York loses jurisdiction of an action therein unless he renders judgment therein, and also files his decision, within fourteen days of the final submission of the action.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, second district, borough of Manhattan.

F H. Reuman, for appellant.

No appearance for respondent.

GILDERSLEEVE, J. It appears from the record that the action was commenced on October 9, 1902, and was tried and submitted on November 14, 1902. The justice found for plaintiff on a cause of action based on an alleged breach of contract, for $200 damages and $22 costs. The defense was a general denial. There is sufficient evidence to sustain the finding of the justice in favor of the plaintiff on the disputed questions of fact, and there is only one exception in the case, and that one is of small importance.

It appears, however, from the record that plaintiff amended his complaint by reducing his demand for damages from $200 to $190. The justice seems to have overlooked this fact when he fixed the damages at $200. This error, however, is one that could be rectified by this court by a modification of the judgment, without a reversal, which we would be disposed to do, were it not for the fact that the record shows that the justice had lost jurisdiction of the case.

As we have seen, the case was submitted on November 14, 1902. The decision was signed on November 28, 1902, but the record

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states as follows, viz.: "The decision of the justice was filed in the clerk's office of this (the Municipal) Court, on Dec. 2nd, 1902. Sd. Francis Mangin, Clerk." It, therefore, appears that the decision was not filed with the clerk of the Municipal Court until more than fourteen days after the case had been submitted.

Section 230 of the Municipal Court Act (Laws of 1902, chap. 580) required the justice to render judgment within fourteen days from the time when the case was submitted, except under certain circumstances, which are not applicable here. The rule is well settled that where the justice does not render his decision within the time required by law, he loses jurisdiction of the case, and the judgment rendered under such circumstances must be reversed. See Lambert v. Salomon, 28 Misc. Rep. 562. Previous to the act of 1902, above quoted, the limit of time was eight days. It is now fourteen days. In the case at bar, as we have seen, the decision was indorsed on the papers, on November 28, 1902, fourteen days after the case had been submitted, but this decision was not delivered to the clerk of the Municipal Court until four days after the expiration of the fourteen days, *i. e.*, on December 2, 1902. It must be held that the simple indorsement of the decision on the papers, within the time limited by the statute, is not a sufficient compliance with the statute. Unless the decision is delivered to the clerk within the statutory time, the justice loses his jurisdiction of the case. See Dalton v. Loughlin, 4 Abb. N. C. 187; Orvis v. Curtiss, 28 N. Y. Supp. 728. The reason for this construction of the statute is very simple, as otherwise the justice, after signing his decision, could hold it back indefinitely without losing jurisdiction of the case.

The judgment must be reversed, with costs to appellant.

FREEDMAN, P. J., and GIEGERICH, J., concur.

Judgment reversed, with costs to appellant.

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JOHN J. RYAN, Respondent, v. THE CITY OF NEW YORK, Appellant.

(Supreme Court, Appellate Term, March, 1903.)

New York city — Auctioneer's action to recover part of a license fee paid under L. 1897, ch. 682 — Duress — Estoppel.

An auctioneer of the city of New York licensed under the general act (L. 1897, ch. 682, § 2) by the mayor, for a fee of $250, from Sept. 15, 1897, to June 15, 1898, cannot recover of the city so much of the fee as was applicable to the time from Jan. 1, 1898 — when the present charter (L. 1897, ch. 378) requiring no license fee went into effect — to June 15, 1898, nor is he given any such right by section 34 of the charter.

The charter did not impliedly repeal L. 1897, ch. 682, nor did it make the license void.

Semble, that a person who voluntarily pays the city a fee for a license, as auctioneer, cannot subsequently recover the fee as paid under duress, and is also estopped from asserting that the mayor had no power to exact the fee.

APPEAL from a judgment of the Municipal Court of the city of New York, tenth district, borough of Manhattan, entered on the 21st day of November, 1902, for the sum of $228.84 damages and costs.

Geo. L. Rives, Corporation Counsel (Terence Farley and Leroy D. Ball, Jr., of counsel), for appellant.

James E. Smith, for respondent.

GIEGERICH, J. The action was commenced by the service of a summons to recover the unearned portion accruing after January 1, 1898, of an auctioneer's license fee of $250 paid by the plaintiff-respondent to the mayor of the city of New York. The complaint alleged that on the 15th day of September, 1897, upon the application of the plaintiff, William L. Strong, the then mayor, issued to him "a certain license to engage in and carry on the business and occupation of an auctioneer in the county of New York, said license to continue in force up until June 15, 1898,"

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and at the same time he paid to the mayor "the sum of $250 for said license," and filed a bond, etc., "pursuant to the provisions of chapter 682 of the Laws of 1897." The gist of the complaint is contained in paragraph III, which is as follows: "Third. That on January 1, 1898, said license ceased, determined and became void by virtue of section 34 of chapter 378 of the Laws of 1897, known as 'the Greater New York charter,' thereupon became due and owing on account thereof by the defendant to the plaintiff, by virtue of section 34 of the Greater New York charter, a ratable proportion of the whole license fee paid by this plaintiff, as hereinbefore set forth, the unexpired portion of said license, to wit, from January 1, 1898, to June 15, 1898, the sum of $177.40." By its answer the defendant admitted the granting of the license, the payment of the license fee, the filing of the bond, the presentation of the claims upon which the action was based to the comptroller, and denied, on information and belief, the remaining allegations of the complaint. There is no dispute as to the facts, and this appeal presents simply questions of law.

The license as an auctioneer was granted to the plaintiff on the 15th day of September, 1897, while chapter 682 of the Laws of 1897 was in force, and upon receiving the license he paid therefor the sum of $250. This license recited that it was to continue in force until the 15th day of June next (1898), "*unless sooner revoked by the Mayor.*" The Greater New York charter went into effect on the 1st day of January, 1898, and its thirty-fourth section provided as follows: "Sec. 34. The city clerk shall have authority to grant licenses to any person engaged in and carrying on the business and occupation of auctioneer, or desiring to be so engaged, on such person filing a bond, approved by him, with two good sureties in the penal sum of two thousand dollars. The president of the council, on complaint of any person having been defrauded by an auctioneer, or by the clerk, agent or assignee of such auctioneer, doing business in said city, is authorized and directed to take testimony under oath relating thereto; and if the charge shall, in his opinion, be sustained, he shall revoke the license granted to him and direct the bonds to be forfeited."

It is difficult to understand how the section last quoted in any way abrogated or annulled the plaintiff's license, or in any way affected it. It certainly did not in terms entitle him to the return of any portion of the license fee, nor did it by implication.

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If we assume that chapter 682 of the Laws of 1897 was not repealed by section 34 of the Greater New York charter, and by virtue of section 1610 thereof was extended to the city of New York as therein constituted, as was expressly held in the Appellate Division of this department in Saul v. United States Fidelity Co., 71 App. Div. 77, then there can be no recovery. The syllabus of that case is as follows: "Section 5 of chapter 682 of the Laws of 1897, relating to auctioneers in cities of 1,000,000 inhabitants and over, which provides that the sureties upon a bond given by an auctioneer pursuant to the act 'shall be liable for breach of contract or of duty towards the person or persons consigning goods for sale, as well as for the other acts, omissions and matters now provided by law,' was by virtue of section 1610 of the charter of Greater New York (Laws of 1897, chapter 378) extended to the city of New York as therein constituted." It is true that this case, in the main, deals with section 5 of chapter 682, while the second section is the one which requires the payment of a license fee of $250; but still, under this decision, there is no room to doubt that, so far as it is not inconsistent with section 34 of the statute in its entirety, it is not impliedly repealed. Baker v. City of New York, 56 App. Div. 350; People ex rel. Pumpyansky v. Keating, 168 N. Y. 390. The only appreciable differences between the two statutes are: (1) Under the act of 1897 the mayor granted the license, while under section 34 the licenses are granted by the city clerk. (2) Under the act of 1897 the bond is to be approved by the comptroller, while under section 34 it is to be approved by the city clerk. (3) Under the act of 1897 a license fee of $250 is exacted, while under section 34 no license fee is required. But section 34 does not say anything about the return of the money. It merely takes away the requirement of a fee. Much less does it contain any provision as to the repayment.

Under such a state of facts we do not see how there could be any recovery of any amount whatever. The case is very analogous to that where, under the statutes of the United States, license fees were required to be paid in *order to professional* practice, and, when the law repealing such licenses went into effect, there was no pretense on the part of any one that any portion of such license fee was returnable because the law went into effect durthe year for which licenses had been paid. But, assume that

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chapter 682 of the Laws of 1897 was repealed by section 34 of the Greater New York charter, it does not follow that the plaintiff's license ceased, determined, and became void. Section 1614 of the charter expressly provides that "*No right or penalty of any character shall be lost or impaired or affected by reason of* this act." See Matter of Munn, 165 N. Y. 149. The same rule is enunciated in section 31 of the Statutory Construction Act, in the following language: "The repeal of a statute or part thereof shall not affect or impair any act done or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be asserted, enforced, prosecuted or inflicted as fully and to the same extent as if such repeal had not been effected."

We cannot conceive how the provisions of section 34 can be construed so as to cause plaintiff's license to cease, determine, and become void. Forfeitures are abhorred by the law, and if it is possible to construe a statute in such a way as to avoid a forfeiture, that construction will be given to it. Endlich on Interpretation of Statutes, § 343. But, if no recovery can be had under any of the provisions before mentioned, it is equally clear that the plaintiff cannot maintain this action on the theory that the payment of the license fee was not a voluntary payment or made under coercion or duress. In the first place there is no such cause of action pleaded, and it is well settled that this is necessary in order to entitle to a recovery. Commercial Bank v. City of Rochester, 41 Barb. 341; Gates v. Dundon, 18 N. Y. Supp. 149. But if this were not so, by accepting the benefits of the license, the plaintiff is estopped from asserting that the mayor did not have the power to exact the fee. Matter of Peaslee, 73 Hun, 113.

At the close of the plaintiff's case his counsel moved to conform the complaint to the proof submitted. Just what was meant by this motion is not clear, unless it may be surmised that, because defendant's counsel argued that the money could not be recovered back because the payment was voluntary, the plaintiff had introduced in the evidence some proof that the payment was involuntary. We have looked the record over with care for any such proof, but have been unable to find any which would make it involuntary under the authorities. See Deshong v. City of New York, 74 App. Div. 234, where the city authorities refused to allow the owner of the abutting property to reconstruct a vault until he

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obtained a permit. In order to obtain this permit he paid under protest the sum of money demanded therefor, and then brought an action to recover it back, on the theory that it was paid under compulsion and duress. He testified that he paid the money "under actual compulsion and duress and in order to immediately proceed with the construction of a certain building upon said premises then in process of construction," but the court held that a payment, made under such circumstances, was voluntary and could not be recovered. Here there is no pretense that the plaintiff was stopped from engaging in his chosen occupation. Nor did he pay the money under duress, nor does it appear that he made any protest upon paying it. The case of Custin v. City of Viroqua, 67 Wis. 314, is especially in point and collates many authorities upon the subject, and we think the opinion in that case is conclusive against the contention of the respondent. We are, therefore, of the opinion that the judgment should be reversed and the complaint dismissed, with costs.

FREEDMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and complaint dismissed, with costs.

ISIDORE W. GRUENBERG, Appellant, *v.* OWEN TREANOR, Respondent.

(Supreme Court, Appellate Term, March, 1903.)

Statute of Frauds — New promise in writing to pay a debt discharged in bankruptcy — Action, upon the old debt, maintainable.

In an action for goods sold, it appeared that, after the defendant had filed a petition in bankruptcy and had scheduled the said debt, but before his discharge, he wrote upon the face of the plaintiff's bill, showing the balance due, and signed these words: "This account is O. K. August 22nd. I will pay it."

Held, that, within L. 1882, ch. 324; L. 1897, ch. 417, § 21, subd. 5, the words quoted amounted to a new promise in writing to pay the debt, which had been discharged in bankruptcy.

That the plaintiff might sue for the goods sold and need not sue upon or plead the new promise.

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APPEAL by the plaintiff from a judgment dismissing the complaint in the Municipal Court of the city of New York, eleventh district, borough of Manhattan.

George J. Gruenberg, for appellant.

Jacob Newman, for respondent.

GIEGERICH, J. The pleadings in this case were in writing, from which it appears that the complaint sets up an indebtedness for goods sold and delivered, and for a second cause of action the plaintiff sues on an account stated.

The defendant in his answer admits the delivery of the goods, but denies an account stated, and for a further defense pleads that he has been duly discharged in bankruptcy, sets up the Statute of Frauds and pleads want of consideration.

On the trial the following facts appeared: That on the 25th day of June, 1902, the defendant owed the plaintiff $205, being the balance of an account for goods sold and delivered. That on August ninth following, the defendant filed his petition in bankruptcy and by scheduling the debt made the plaintiff a party to the proceeding. That a discharge was granted to the defendant in that proceeding on October fifteenth following. That on August twenty-second, after the filing of the petition and before the discharge, the defendant signed and delivered to the plaintiff his written promise to pay the debt in the words and figures following:

"NEW YORK, *Aug.* 22*nd* 1902.

"Mr. Owen Treanor to I. W. Gruenberg, Dr. * * *

"1902.

"June 26. To balance, $205.

"This account is O. K. August 22nd. I will pay it.

"(signed) OWEN TREANOR."

Subsequently, both before and after the discharge, there were further sales made by the plaintiff to the defendant, and payments made by the defendant in cash. That on the twenty-fifth day of October following, the plaintiff presented to the defendant a statement of the account, showing the indebtedness of June twenty-fifth as well as the subsequent transactions, and showing

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the balance of defendant's indebtedness to be $205 on that date — that is October twenty-fifth — at the same time saying to the defendant, "That leaves a balance of $205," to which the defendant answered, "Yes, that is all right," and that at the same time the defendant took from the plaintiff and kept a duplicate of the latter's statement showing these things.

Before the passage of chapter 324 of the Laws of 1882 it was frequently held in this State that while the legal obligation of a bankrupt was by force of positive law discharged and the remedy of the creditor existing, at the time the discharge was granted, to recover his debt by suit was barred, yet that the debt was not paid by the discharge, and that the moral obligation of the bankrupt to pay it remained. That it was due in conscience although discharged in law, and this moral obligation, uniting with a subsequent promise by the bankrupt to pay the debt, gave a right of action.

But the act last cited provided, "That no subsequent or new promise hereafter made by any person duly discharged in bankruptcy to pay any debt so discharged in bankruptcy shall revive such debt against the person so discharged, unless such subsequent or new promise shall be contained in some writing signed by the person to be charged thereby."

This law was, if possible, made more stringent by chapter 417, article 2, section 21 of the Laws of 1897, which provides that "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking * * * (subdivision 5) Is a subsequent or new promise to pay a debt discharged in bankruptcy."

There can be no doubt but that the balance of account of $205 for goods sold and delivered, having been scheduled in the petition in bankruptcy, was discharged by the discharge in bankruptcy subsequently granted; but in our opinion it is equally clear that the indorsement upon the bill rendered August 22, 1902, "This account is O. K. August 22nd I will pay it," signed by the debtor, took the transaction out of the operation of chapter 324 of the Laws of 1882, and also of chapter 417 of the Laws of 1897, and is at least equally binding upon the defendant as a promissory note, given by him for the debt after he had been

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adjudicated a bankrupt and before his discharge, would have been, and this has been expressly held to be a good obligation. Jersey City Ins. Co. v. Archer, 122 N. Y. 376, 378.

But the respondent objects that the suit was brought for goods sold and delivered, and was not based upon the new promise to pay, which should have been pleaded.

The necessity of pleading the new promise was carefully considered by the Court of Appeals in Dusenbury v. Hoyt, 53 N. Y. 524, where the court, per Andrews, J., said: "The question whether the new promise is the real cause of action, and the discharged debt the consideration which supports it, or whether the new promise operates as a waiver by the bankrupt of the defense which the discharge gives him against the original demand, has occasioned much diversity of judicial opinion. The former view was held by Marcy, J., in Depuy v. Swart, 3 Wend. 139, and is, probably, the one best supported by authority. But, after as before the decision in that case, the court held that the original demand might be treated as the cause of action, and, for the purpose of the remedy, the decree in bankruptcy was regarded as a discharge of the debt *sub modo* only, and the new promise as a waiver of the bar to the recovery of the debt created by the discharge. We are of opinion that the rule of pleading, so well settled and so long established, should be adhered to. The original debt may still be considered the cause of action for the purpose of the remedy. The objection that, as no replication is now required, the pleadings will not disclose the new promise, is equally applicable where a new promise is relied upon to avoid the defense of infancy or the Statute of Limitations, and in these cases the plaintiff may now, as before the Code, declare upon the original demand. Esselstyn v. Weeks, 12 N. Y. 635."

In Scheper v. Briggs, 28 App. Div. 115, 117, Mr. Justice Rumsey, in delivering the opinion of the court, after stating that "The legal obligation of a bankrupt upon any debt proved under the act is, by force of positive law, discharged, and the remedy of the creditor existing at the time of the discharge is absolutely and entirely taken away. No cause of action is left to the creditor upon the debt thus discharged, and it would seem to be a logical conclusion that, if a new promise to pay the debt was made, the action against the bankrupt must be brought upon the new promise, and not upon the original debt, because, the new promise

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being the real binding obligation, constitutes the only cause of action," significantly adds: "But, unfortunately, the logical rule of pleadings has never been insisted upon, in this State, at least, and it has been held that, although the old debt has been discharged, yet the creditor may bring his action upon it, and prove the new promise in avoidance of the discharge," citing Dusenbury v. Hoyt, *supra*.

This being the well-settled rule of law in this State, we think the court erred in dismissing the complaint upon that cause of action, and, having arrived at this conclusion, it is unnecessary to determine at this time whether or not the action could have been maintained as upon an account stated.

We are, therefore, of the opinion that the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

FREEDMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

THE EGYPTIAN FLAG CIGARETTE CO., Appellant, *v.* CHARLES COMISKY, Respondent.

(Supreme Court, Appellate Term, March, 1903.)

Evidence — Admissibility and proof of admissions — Practice in the Municipal Court of the city of New York where the plaintiff fails to prove his case.

Admissions which a party to an action made upon a former trial thereof are admissible against him upon a second trial as declarations against his interest.

They may be proved by the stenographer's minutes of the former trial, as embodied in the return on a prior appeal, where the judge who conducted that trial has certified that the minutes are correct.

Admissions on a former trial may be proved by a person who heard them made.

A plaintiff, who does not prove his cause of action in an action in the Municipal Court of the city of New York, should be nonsuited, but it is erroneous for the court to render a judgment for the defendant.

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APPEAL from a judgment rendered against the plaintiff in the Municipal Court of the city of New York, second district, borough of Manhattan.

P. Tillinghast (B. Benjamin Schiff, with him on brief), for appellant.

Aaron Morris, for respondent.

GIEGERICH, J. This case has been twice tried before the same justice, the last time on the 9th of October, 1902, and judgment was rendered on the twenty-first of October following, in the following words: "Judgment for defendant, Herman Bolte, Justice, October 21, 1902."

The action was brought against the defendant as a marshal in the city of New York, to recover the sum of ninety dollars and fifty cents, a balance remaining in his hands realized from property levied on under an execution against the plaintiff in an action entitled, Solomon Emanuel against Egyptian Flag Cigarette Company, over and above the amount required to pay the said execution which was for the sum of sixty-nine dollars and fifty cents.

On the last trial the plaintiff offered in evidence the summons in the action of Emanuel against the Egyptian Flag Cigarette Company, together with the judgment indorsed thereon for the sum of sixty-nine dollars and fifty cents, which was admitted. The execution in that action on the judgment was also offered in evidence and on the back thereof was the following indorsement: "The within execution satisfied, Charles Comisky."

The plaintiff then offered in evidence certain portions of the stenographer's minutes of the previous trial contained in the return on the prior appeal to this court and certified by the justice who tried the second action as well as the first, to be correct. The portion of the testimony so offered was to the effect that the defendant Comisky was one of the marshals of the city of New York duly appointed to act as such. That he was the marshal to whom the execution in the case of Emanuel against the cigarette company was issued, and that by virtue of that execution he levied upon the property of the cigarette company. The defendant objected to the introduction of the same in evidence upon the ground that it was immaterial, irrelevant and incompetent, and upon the further ground that the minutes of the stenographer

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were the best evidence, which objection was sustained and the plaintiff duly excepted to such ruling.

The plaintiff then called the stenographer who took the minutes of the first trial, who testified that he was present thereat and that the paper offered in evidence was a correct transcript of the minutes taken at the first trial by him. The plaintiff's counsel then took the stand and offered to prove the admissions made by the defendant at the former trial of the case. To this defendant's counsel objected upon the ground that the same was irrelevant, incompetent and hearsay. The court sustained the objection and the plaintiff duly excepted thereto. Afterward judgment was rendered as before stated.

We think the court erred in excluding this evidence. The certificate of the judge who tried both cases to the correctness of the minutes offered made them clearly admissible, even without the testimony of the stenographer and plaintiff's counsel; much more after such testimony was given. In Fisher v. Monroe, 2 Misc. Rep. 326, it was said: "In aid of their contention, the defendants' counsel offered plaintiff's cross-examination on a previous trial in evidence, to prove admissions by her as to whether or not she was ill or merely tired out, and also to prove her admissions as to her duties as an actress upon rehearsals. The court excluded the evidence unless the attention of the witness was first called to what she had testified to on the former trial. The defendants' counsel thereupon stated to the court that it was not for the purpose of impeaching the witness, but to prove admissions made by her. Still the court would not allow him to do so, and defendants' counsel excepted. It is well settled that an admission made at one stage of an action, binds the parties at all subsequent stages, as primary evidence.

"The rule which makes it incumbent upon the cross-examining counsel first to direct the witness' attention with reasonable precision to, and interrogate him respecting, an alleged contradictory statement before the latter may be given in evidence, does not apply to parties to the action, and as to them the alleged contradictory statement is admissible as a declaration against interest."

In the case of Reed v. McCord, 160 N. Y. 330, 341, the rule is stated to be: "In a civil action the admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever or to whomsoever made." The

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same principle has been held in Stephens v. Vroman, 16 N. Y. 381; Owen v. Cawley, 36 id. 600; Cook v. Barr, 44 id. 156; McPhillips v. New York, N. H. & H. R. Co., 14 N. Y. Supp. 928. In this case they were also admitted as declarations against interest.

We also think the judgment rendered is erroneous in that it directs judgment for the defendant. Chapter 580 of the Laws of 1902, section 248, provides: "Nonsuit; when authorized.—Judgment that the action be dismissed with costs, without prejudice to a new action, shall be rendered in the following cases: * * * 4. Where the plaintiff does not prove his cause of action." See also Kieffer v. Metropolitan St. R. Co., 31 Misc. Rep. 780; Merkin v. Gersh, 30 id. 758; Dennison v. Musgrave, 20 id. 678.

For these errors the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

FREEDMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

ELMER E. COOLEY, Respondent, *v.* THE PENNSYLVANIA RAILROAD CO., Appellant.

(Supreme Court, Appellate Term, March, 1903.)

Municipal Court of the city of New York — Payment of costs and fees when unnecessary on filing notice of appeal — Waiver — Damages for a passenger's delay.

It is not a valid objection to the hearing of an appeal in an action begun, in the Municipal Court of the city of New York, before, but in which issue was joined after, Sept. 1, 1902, when the Municipal Court Act went into effect, that the appellant did not upon filing his notice of appeal with the clerk pay him his fee for a return and the costs of the action, and this because the Municipal Court Act (L. 1902, ch. 580) governs and does not require such payment in such case.

Service by the respondent of amendments to the case on appeal is a waiver of any defects in the appellant's procedure.

A lawyer, delayed by a railroad wreck and who has not informed the carrier of special circumstances which make it necessary for

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him to reach his destination on schedule time, can recover of the carrier merely compensatory damages — the value of his time, during the period of delay, based upon the average of what he had earned for at least a year preceding the time of the occurrence.

APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, tenth district, borough of Manhattan, rendered in favor of the plaintiff upon a trial had before the court without a jury.

Robinson, Biddle & Ward (A. Leo Everett, of counsel), for appellant.

Francis B. Elgas, for respondent.

GIEGERICH, J. This action was brought to recover damages claimed by the reason of delay in transporting the plaintiff as a passenger on defendant's railroad.

On the argument of the appeal respondent's counsel stated that the costs and fees had not been deposited with the clerk upon the filing of a notice of appeal, as required by section 3047 of the Code of Civil Procedure, and, therefore, that the appeal should be dismissed.

We think this objection was not well taken. The summons had been issued prior to September 1, 1902, issue was not joined until the 2d day of September, 1902, and the case was not tried until the twenty-sixth day of that month.

It is true that section 361 of the Municipal Court Act (Laws of 1902, chap. 580), has a saving clause providing that actions commenced before the 1st of September, 1902, may be prosecuted in the same manner as before, yet it has been expressly held in this court (Kochman v. Hefter, N. Y. L. J., Jan. 7, 1903), that in actions removed from the Municipal Court to the City Court and tried after that date, costs should be allowed as if the action had been commenced in the court to which it was removed, as provided in section 361 of the act before referred to, although, under the provision of the Code, no costs were provided for in such cases. If the Municipal Court Act is effective in imposing costs in such cases where none had been provided for, it surely ought to be effective to relieve from costs where that had been pro-

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vided for, especially where when the law went into effect there were no costs of any kind as against either party.

In Langbein's Municipal Court Practice (5th ed. 404), it is said that "the provision in section 3047 as to the payment of the costs of the action, included in the judgment, has been omitted. In section 317 it is *assumed* that it is not omitted, for that section provides that within thirty days after the service of the notice of appeal, 'and the payment of the costs and fees as prescribed in this act' the clerk of the court must make the return, but there is no provision 'prescribed in this act' for the payment of the 'cost' or costs. Section 347, subdivision 3, entitled 'Fees payable to clerks,' provides that 'For a return on appeal from a judgment or order two dollars shall be paid to the clerk as court fees' and that is the only provision to be found 'prescribed in this act' to comply with section 317."

Moreover, the respondent served amendments to the case on appeal, which could only be done under the provisions of the Municipal Court Act, for it was not provided for by the Code of Civil Procedure (Cothren v. Chaffee, 39 Misc. Rep. 339), and by this act we think he waived the objections and ratified the procedure of the appellant.

We, therefore, think the appeal is regularly before us for adjudication.

The facts in the case are practically undisputed, and, as far as material, are as follows: On or about the 10th day of December, 1899, the plaintiff in the city of New York, purchased a ticket to Philadelphia and return. On his return he left Philadelphia on the seven thirty-three o'clock A. M. train, December eleventh, which was due in New York at nine thirty o'clock A. M., as appeared by the time tables published by the defendant. At the time when he started there had been a wreck upon the line of defendant's road, of which the plaintiff was not informed. Owing to the wreck the train did not reach New York until half-past three o'clock in the afternoon. In the meanwhile, a case in which he was attorney for the plaintiff had been called in the City Court of the city of New York at ten o'clock in the morning, and, owing to his failure to appear, the case had been dismissed, although he had telegraphed to his own office and to the judge before whom the case was to be tried, that he could not be there on time.

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The plaintiff, having his return ticket, did not have to purchase one, and before starting from Philadelphia he did not disclose to any servant or officer of the defendant his profession or the nature of his business on that day. He testified that he told the conductor when on the train at Trenton, that he had a court engagement, but at that time it was impossible for him to be transported to New York in time to be present at the call of the City Court calendar.

The fact that there was a delay of several hours called upon the defendant to show, if he could, that such delay was the result of inevitable accident, or that it was excusable. This it did not do, and, therefore, the question for us to determine is what measure of damages should have been applied to the case.

It is well established that in order to hold the carrier for damages beyond those which accrue upon his negligent delay *naturally and in the order of things,* he must be informed of the special circumstances which make promptness on his part important to the passenger and which may occasion exceptional damages as the result of his delay. In other words, that both parties to the contract must be fully informed as to the circumstances and the reasons why it is important to the passenger to arrive at on or about the schedule time. DeLeon v. McKernan, 25 Misc. Rep. 182; Hadley v. Baxendale, 9 Exch. 341; North American T. & T. Co. v. Morrison, 178 U. S. 262; Booth v. Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487; Hutchinson on Carriers, § 773, p. 920.

This rule would exclude the twenty dollars paid by the plaintiff to open the default, even if the plaintiff were liable for the same, but an attorney is not liable for costs in such a case, and if he chose to pay them it was a voluntary act on his part.

In our opinion the only damages which can be recovered in this case are compensatory merely and such as would naturally and in the order of things flow from the delay, and these, under the facts presented in this case, would be the value of his time for the period covered by the delay, which is to be measured, not by the largest sums he has earned for such time, nor by the smallest, but by an average of what he has earned for at least a year immediately preceding the time of the occurrence. Walker v. Erie R. R. Co., 63 Barb. 260.

Now, as to such value, the only evidence in the case is the

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following testimony given by the plaintiff: "Q. What were your services reasonably worth for the time? A. Depending on the kind of case it is, from $50 to $100 a day. Q. Do you consider $75 a reasonable compensation a day? A. I do."

This clearly does not have reference to the plaintiff's average earnings for any given period of time, but is a mere estimate of what he might have charged under certain circumstances "depending on the kind of case" he might have had, and is not a sufficient basis for determining the value of such time.

We, therefore, think the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

FREEDMAN, P. J., concurs; GILDERSLEEVE, J., taking no part.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

THE DEPARTMENT OF HEALTH OF THE CITY OF NEW YORK, Appellant, *v.* HANNAH M. HALPIN, Respondent.

(Supreme Court, Appellate Term, March, 1903.)

Municipal Court of the city of New York — Jurisdiction — Construction of L. 1902, ch. 580, § 25 — Removal to proper district.

Although subdivision 5 of section 25 of the Municipal Court Act (L. 1902, ch. 580) requires an action, for a penalty for a violation of an order of the department of health of the city of New York, to be brought in the court district in which the violation happened, the provisions of subdivision 4 of said section, permitting the action to be tried where brought unless upon or before joinder of issue the defendant demands a transfer to the proper district, lead to the conclusion that jurisdiction is not affected by bringing the action in a district other than the one in which the violation occurred.

Unless the defendant demands a transfer upon or before joinder of issue the right of removal is lost and the judgment stands.

APPEAL by the plaintiff from a judgment rendered in the Municipal Court of the city of New York, eighth district, borough of Manhattan, on the 14th of November, 1902, and filed and entered in the office of the clerk of that court on the same day, dismissing the complaint on the ground of lack of jurisdiction.

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George L. Rives, Corporation Counsel (Frederick W. Stelle, of counsel), for appellant.

No appearance for respondent.

GIEGERICH, J. The action was commenced by personal service of the summons on the defendant on the 30th day of September, 1902, and was brought to recover a penalty of $250 from the defendant for a violation of the order of the board of health, issued to the defendant on the 6th day of August, 1902, directing her to make certain improvements required by the Sanitary Code, on the premises 537 and 539 West One Hundred and Thirty-third street, owned by her.

The defendant did not appear on the return day of the summons or on the trial of the action. The testimony of the inspector showed that at the time of his last inspection of the premises on the 6th day of November, 1902, more than three months after the order was served on the defendant, it had not been complied with.

The only question considered by the court in dismissing the action, was that of the jurisdiction of his court, and the justice held that section 25 of the Municipal Court Act (chapter 580, Laws of 1902), was mandatory, and that the action must be brought in the district where the violation occurred, notwithstanding the fact that the defendant did not appear and ask to have the case removed to that district.

Section 1262 of chapter 466 of the Laws of 1901 provides that whoever violates any order of the board of health shall be guilty of a misdemeanor; and also that any person who shall have done or omitted to do anything which by law or ordinance subjects the party guilty thereof to punishment for a misdemeanor, shall, in addition thereto, be subject to a penalty of $250, to be sued for and recovered by said department *in any civil tribunal in said city.*

We think that the justice who tried the case erred in holding as he did, and we are also of the opinion that this action could have been properly tried in the Municipal Court, eighth judicial district, notwithstanding the violation did not occur there.

Section 25 of the Municipal Court Act, as in force at the time the action was brought, provides as follows:

"Sec. 25. In what district brought.— An action or proceeding

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of which the municipal court has jurisdiction must be brought:

"1. In a district in which either the plaintiff or defendant or one of the plaintiffs or one of the defendants resides, unless all the plaintiffs or all the defendants reside out of the city of New York, in which case the action or proceeding may be brought in said court in any district.

"2. If the defendant be a corporation created by law, in a district in which the plaintiff or either of the plaintiffs resides, or in which (if it be a corporation) it transacts its general business or keeps an office or has an agency established for the transaction of business or is established by law, except the corporation of the city of New York, which may sue or be sued in any district, except as provided for in subdivision five of this section.

"3. By plaintiffs not residing in the city of New York, in the district in which the defendant, or one of the defendants resides, and against a defendant or defendants, not residing in said city, in the district in which the plaintiff or one of the plaintiffs resides; but where all the parties reside out of said city, the action may be brought in any district. No person who shall have a place in said city for the regular transaction of business shall be deemed a nonresident under the provisions of this act.

"4. *If the district in which the action or proceeding is brought is not the proper district, the action may, notwithstanding, be tried therein, unless the action is transferred to the proper district before trial upon demand of the defendant made upon or before the joinder of issue in writing or in open court, followed by the consent of the plaintiff, given in like manner, or the order of the court.* The demand must specify the district to which defendant requires the action to be transferred. The court must make such order when the district in which the action or proceeding is brought is not the proper district, as specified in this section *or the next one, if such demand be made.*

"5. All actions by or on behalf of the city of New York to recover a penalty or fine for a violation of any corporation ordinance, when the amount of such penalty or fine shall not exceed five hundred dollars, must be brought in the district in which the violation of such ordinance happened or occurred. And all actions to recover a penalty or fine for a violation of any provision of the sanitary code or of any regulation of the fire commissioner

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or of any laws or ordinances which either the health or the fire department is authorized, empowered and especially charged to enforce, where the amount of such penalty or fine shall not exceed five hundred dollars, must be brought in the district, in which such violation happened or occurred."

From this it appears (subd. 5) that all actions to recover a penalty or a fine for a violation of any provision of the Sanitary Code or of any regulation of the fire commissioner or of any laws or ordinances which either the health or fire department is authorized to enforce where the amount of such penalty or fine shall not exceed $500, must be brought in the district in which such violation happened or occurred.

Subdivision 4, however, provides that if the district in which the action is brought is not the proper district, the action *may, notwithstanding, be tried therein* unless the action is transferred to the proper district, as specified in that section or the next one, *if such demand be made.*

As section 26 relates, not to the venue or jurisdiction of the court, but to the manner of commencing an action, it is clear that the words "this section or the next one" in the fourth subdivision, refer to the subdivisions of the twenty-fifth section, and not to section 26 of the act. Hence it follows that it was the intention of the Legislature to provide that, if the defendant did not appear and make a demand for the removal of the case to another district where he had been served personally with the summons, to give the court issuing the summons jurisdiction to try the case and to render judgment according to the evidence.

The exceptions stated in subdivisions 4 and 5 indicate that the word "must" in this section is not mandatory in the sense of taking away jurisdiction from a court other than the one specified therein as the place of trial, but it is used simply for the purpose of giving the defendant who is being sued in a wrong district, the *absolute right of removal* if he makes his demand at the proper time and in the proper way. If the word "may" were used, instead of the word "must," it would leave the question of district entirely at the option of the plaintiff. Obviously, the Legislature intended in using the word "must" in this connection, to indicate that a defendant could insist upon the action being transferred to the proper district if it was brought in the wrong one. In order, however, to assert this right he must appear and make the demand,

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or if he fails to appear his right to removal is lost, and the court where the action is brought has jurisdiction to proceed. Barker v. Archer, 49 App. Div. 80.

The judgment should, therefore, be reversed and a new trial granted in the court below.

FREEDMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and a new trial granted, with costs to appellant to abide event.

SAMUEL BRILL, MAX D. BRILL, and MAURICE BRILL, Respondents, *v.* SARAH SCHLOSSER, Appellant.

(Supreme Court, Appellate Term, March, 1903.)

Lease — Deposit for security.

A deposit applicable by the terms of a lease, for four years and ten months' rent payable monthly in advance, "first to any deficiency which may occur on her (the tenant's) part in the performance of the covenants of this lease should there be any, and, if not, then as payment of the rent of the last three months of the term of this lease" cannot be applied, at the tenant's instance, to a default of hers, in paying rent, which occurred in the fourth month after she took possession, and the deposit must be held as security until the last three months of the term begin to run, when it will become applicable to those months.

APPEAL from a judgment of the Municipal Court of the city of New York, tenth district, borough of Manhattan, in favor of the plaintiffs.

Warren I. Lee, for appellant.

Morris J. Hirsch (Charles Grossman, of counsel), for respondents.

GIEGERICH, J. The action was brought to recover rent due for the month of October, 1902, under a lease for a term of four years and ten months, beginning the 1st of July, 1902, at an annual ren-

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tal of $1,400, payable in equal monthly installments, in advance, the first day of each month. The lease contains sundry other covenants of the customary kind in such cases.

The only question involved is whether a certain deposit, made by the tenant with the landlord at the time the lease was executed, can be applied, at the option of the defendant, to the payment of the rent sued for, or whether the plaintiffs are entitled to hold such deposit until the end of the term. The provision of the lease on which the question turns is as follows: "And the said party of the second part agrees to pay the sum of three hundred and fifty dollars upon the execution of this lease to be applied first to any deficiency which may occur on her part in the performance of the covenants of this lease should there be any, and, if not, then as payment of the rent of the last three months of the term of this lease." The appellant claims that the only deficiency which has occurred in the performance of the covenants of the lease is the nonpayment of the October rent sued for, and therefore that the deposit should have been applied to such payment.

We think it clear that no such effect of the provision was intended by the parties. After three months of such application of the deposit nothing would remain for the balance of the term to secure the plaintiffs for the performance of the other covenants of the lease, for which it seems plain, this deposit was primarily made. There would not be, thenceforth, any security even for the payment of the rent. When the last three months of the term arrive the defendant will be entitled to have this fund drawn upon for the payment of the rent but until that time, if the relation of landlord and tenant continue to exist, it must be held intact to secure performance of the other covenants.

The appellant cites Scott v. Montells, 109 N. Y. 1; Chaude v. Shepard, 122 id. 397; Michaels v. Fishel, 51 App. Div. 274, and Hawthorne v. Coursen, 18 Misc. Rep. 447, where such deposits, less actual damages proved, have been allowed to be recovered after the termination of the lease by the act of the landlord, in the first three cases by summary proceedings, and in the last by reletting the premises to another. Relying on these cases the appellant argues: "If the deposit is applicable to the payment of unpaid rent after termination of the lease, why should it not be applicable for that purpose while the lease is still in force, as in this case?" The construction above given to the provision in con-

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troversy is a sufficient answer to this question. After the tenancy is terminated there can be no further defaults on any covenant, but so long as the tenancy continues the deposit must be held for the purposes plainly intended by the parties.

The judgment should be affirmed, with costs.

FREEDMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment affirmed, with costs.

THE LONG BRANCH PIER CO., Respondent, *v.* HANNAH L. CROSSLEY, First Name "HANNAH" Fictitious, Etc., Appellant.

(Supreme Court, Appellate Term, March, 1903.)

Municipal Court of the city of New York — Order opening default not appealable — Default opened on terms — Impeaching marshal's return of personal service of summons and complaint.

In an action begun in the Municipal Court of the city of New York after Sept. 1, 1902, when the Municipal Court Act (L. 1902, ch. 580) went into effect, the defendant may appeal from a judgment taken against her upon her default, but is prohibited by section 257 of said statute from an appeal from an order opening her default.

The order may, under section 253 of said statute, lawfully provide that the judgment stand as security.

A marshal's return, showing personal service of the summons and verified complaint upon the defendant, cannot be controverted by her affidavit that she was not served, and her affidavit forms no part of the record.

APPEALS from the Municipal Court of the city of New York, second district, borough of Manhattan.

Randolph M. Newman, for appellant.

L. & A. U. Zinke, for respondent.

Per Curiam. The defendant has brought two appeals. The first is from a judgment, entered against her by default, on Sep-

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tember 30, 1902, and the second is from an order, made upon her own application, relieving her from her default upon certain terms.

The action was begun by the issuance of a summons and verified complaint on September 23, 1902, returnable on September 30, 1902. Upon the return day the defendant failed to appear, and plaintiff took a judgment against her by default. On October 15, 1902, an order to show cause was made upon defendant's application why the judgment, entered on default, should not be vacated, set aside and canceled of record. This order was based upon an affidavit, made by the defendant, setting forth the allegation that she had never been served with the summons in this action. The said order was returnable on October 16, 1902, when the motion was argued. On the following day, *i. e.*, October 17, 1902, the justice refused to set aside the judgment, but did open defendant's default, allowing the judgment to stand as security. The cause was set down for trial on October 21, 1902, but was subsequently set down for trial on November 10, 1902.

The respondent moves to dismiss both appeals.

As this action was begun subsequent to September 1, 1902, the provisions of the Municipal Court Act (Laws of 1902, chap. 580) apply. The summons and a verified complaint herein were personally served upon the defendant, according to the return of the marshal, upon September 23, 1902. The return herein is silent as to what proof was offered by the respective parties, upon the return of the order to show cause, regarding the service or non-service upon the defendant of the summons and complaint in this action. It contains only the affidavit of the defendant, alleging that such service was not made, and the certificate of the marshal that such service was made. To this feature of the case, however, we need give no consideration, for the reason that the default was, as we have seen, opened, and the judgment vacated and set aside for all purposes, except that of security to the plaintiff. From the order opening the default herein no appeal lies. Laws of 1902, chap. 580, § 257. An appeal can only be taken from the judgment. See Beebe v. Nassau Show Case Co., 41 App. Div. 456.

As to that portion of the order which permitted the judgment to stand as security, section 253 of the statute, above cited, permits the court to open a default upon "such terms and conditions as the court may deem proper." The court, in the case at bar, had

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clearly the right to impose the condition it did, and we see no reason for disturbing the order in that respect.

The affidavits submitted by the appellant cannot controvert the return, and forms no part of the record, and cannot be considered. See Barber v. Stettheimer, 13 Hun, 198.

Appeals dismissed, with ten dollars costs and disbursements.

Present: FREEDMAN, P. J., GILDERSLEEVE, and GIEGERICH, JJ.

Appeals dismissed, with ten dollars costs and disbursements.

GEORGE W. LEE, Plaintiff, *v.* EMMA LEE, Defendant.

(Supreme Court, Fulton Trial Term, March, 1903.)

Pleading — Illegality not provable under a general denial — Changing position on the trial.

Where the plaintiff sues for specific performance of a contract alleged to have been made by him with the defendant, upon conveying to her real estate, by the terms of which she agreed to reconvey upon the termination of a proceeding to determine his competency to care for himself and his property, the defendant cannot, where she has not alleged illegality but has merely denied generally and set up title in herself as a purchaser for value, move after being defeated to set aside a verdict for the plaintiff upon the ground that the contract was illegal because entered into by both parties to thwart the lunacy proceeding and prevent a conveyance to a committee, if appointed.

The illegality of a contract will not be presumed; it is not issuable under a general denial unless it appears on the face of the complaint or, necessarily, from the plaintiff's evidence.

MOTION by the defendant to set aside the verdict and to dismiss the action upon the ground that the contract found by the jury is illegal as against public policy.

Frank B. Towman and A. J. Nellis, for motion.

J. Keck and Emmet Blair, opposed.

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SPENCER, J. The action was brought by the plaintiff for the specific performance of a trust agreement which he asserts was made between himself and the defendant, at the time he conveyed to her certain real estate, whereby she was to reconvey the same upon the termination of proceedings then instituted, or about to be instituted, in this court, to determine his competency to care for himself and his property. The answer, in effect, is a general denial, the defendant asserting in addition thereto that she holds title to the property by absolute conveyance and not in trust.

The cause was brought on for trial before the court and a jury, and although trial by jury was not a matter of right, it was decided to submit the disputed questions of fact therein to the jury for their determination. Code of Civil Procedure, §§ 968, 969, 971; O'Beirne v. Bullis, 158 N. Y. 466.

At the close of the plaintiff's case, the defendant moved for nonsuit on the grounds that the facts proven were insufficient to constitute a cause of action, and that the trust alleged had not been executed in writing. The trial judge, in denying the motion, stated that in his then view of the case, there was a question of fact for the jury, and that he would leave the questions of law to be afterwards determined by the court. Thereupon the defendant gave proof in contradiction of the plaintiff's claim and in support of her own contention that the conveyance was an absolute one.

Upon all the evidence the court submitted to the jury the sole question whether the deed delivered by the plaintiff to the defendant was so delivered in pursuance of an oral agreement by the defendant that she would reconvey the property to the plaintiff upon the termination of the lunacy proceedings. Neither party requested to go to the jury upon any other question of fact. The jury rendered a verdict to the effect that the deed was delivered in pursuance of such agreement. Thereupon the defendant moved to set the verdict aside and to dismiss the action upon the ground that it appeared from the testimony that the contract found by the jury was entered into by the parties with the intent and purpose of obstructing public justice and to thwart this court in the lunacy proceedings, and was, therefore, illegal as against public policy. No such claim had been made by the defendant at any prior stage of the case. The question at once arises whether

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the defendant is in a position to avail herself of the illegality of the contract in case the same be so regarded.

The rule seems to be well established that under a general denial the defendant may not take advantage of the illegality of the contract, upon which the action is brought, unless such illegality appears either upon the face of the complaint or necessarily appears from the plaintiff's evidence. Milbank v. Jones, 127 N. Y. 370; Honegger v. Wettstein, 13 Abb. N. C. 393; 94 N. Y. 252. The complaint in this action, by reciting the various facts in relation to the institution of the lunacy proceedings, drifts very close to the line of danger; but it contains no specific allegation that the conveyance of the property to the defendant, and the trust therewith created, were for the purpose of keeping the property from the control of any committee which might be appointed by this court. Nor is there any allegation that the defendant agreed to hold said property for any such purpose. Read as a whole, the allegations of the complaint are as consistent with innocence as guilt. An illegal purpose will not be implied. The illegality of the transaction does not, therefore, appear upon the face of the complaint.

Nor do I think the illegality of the contract necessarily appears from the plaintiff's evidence. The strongest language employed by him is as follows: "She said they could take my property out of my hands and put it in the hands of a commission and I would have to take whatever they were a mind to give me; I could not have any control of it. I did not want it that way. I thought I could take care of it myself." But he nowhere says that the defendant agreed to withhold the property from a committee in case one were appointed; or that either of them understood that the transaction into which they entered was for that purpose.

Where the rights of a defendant, if she prevails, must depend for support upon her own corrupt or illegal purpose, she should, on the trial, be required to put forward that purpose in clear and distinct terms at the first opportunity. She may not remain silent, or, as in this case, assert her own and the plaintiff's integrity of purpose, and then, after a finding has been made in harmony with her contention in that regard, but not to her satisfaction as to other matters, be permitted to avail herself of a defense based upon the theory of her own illegal purpose in respect to the mat-

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ter so found. The defendant permitted the sole disputed question in the case to be submitted to the jury, without making claim that either she or the plaintiff in entering into the contract was actuated by any dishonorable, illegal or immoral purpose; and the jury having found that the contract contended for by the plaintiff was the contract made, she should not now be permitted to claim that such contract is void because of her own illegal purpose in entering into the same.

But be that as it may, the facts and circumstances connected with the making of the contract found by the jury will not justify this court in holding that the same was entered into by the parties for the purpose of evading legal proceedings then pending, or thereafter instituted. Cohen v. Berlin & Jones Envelope Co., 9 App. Div. 425; 166 N. Y. 292.

The contract found by the jury was that the deed from the plaintiff to the defendant was delivered in pursuance of an oral agreement by the defendant that she would reconvey the property to the plaintiff upon the termination of the lunacy proceedings. Strictly speaking, the proceedings referred to could only be terminated by a finding therein that the plaintiff was competent, or by the appointment of a committee in case it were found that he was incompetent. Until the happening of the latter event, the court had no right or duty in respect to the plaintiff's property; and any trust which he, prior to that time, may have created in respect to the property, and which by its terms expired upon the happening of that event, could not be said to thwart the court, or be an evasion of its decree. The trust expired when the process of the court took effect. They did not exist at the same time or come in conflict with one another.

As we have seen, the defendant was to reconvey upon the termination of the lunacy proceedings, and this meant either their discontinuance by a finding that he was competent, or by the appointment of a committee if he were found incompetent. The trust imposed the duty upon the defendant to reconvey upon the happening of either event; and, as the former has come to pass, she has no excuse for nonperformance. Had the other event transpired, to wit, the appointment of a committee, thereupon it would at once have become her duty to reconvey as well. Her right to hold the property came to an end simultaneously with the happening of the event which conferred powers and duties

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upon the committee. It is, therefore, difficult to perceive how the contract, if performed in accordance with the clear intentions of the parties, could have accomplished an evasion of the proceedings of the court had a committee been appointed.

As was well said in the Cohen case, when first before this court upon demurrer (9 App. Div. 425): "A contract will not be adjudged to have been illegal when it is capable of a construction which will render it valid. The law will not presume that a contract was made with intent to violate the law, nor is it enough to vitiate the contract that a suspicion or probability of an unlawful intent arises from the contract itself. Lorillard v. Clyde, 86 N. Y. 384."

The court should never import into a contract an element of fraudulent or illegal intent that is not fully justified by the proofs. The defendant went upon the witness stand and expressly denied the existence of any agreement on her part to reconvey, and in order to negative the plaintiff's claim in regard to a trust, testified that the conveyance to her was for a valid consideration, thus rebutting any inference of an illegal purpose that might otherwise be drawn from the plaintiff's testimony.

I am, therefore, of the opinion that the defendant's contention cannot prevail. By failing to set up the illegality of the contract in her answer, she waived the right to avail herself of that defense. A review of the testimony, bearing upon the intent and purpose of the parties in entering into the contract found by the jury, fails to support her contention that such contract was made to thwart the proceedings of this court.

The motion to set aside the verdict and to dismiss the action is therefore denied and judgment directed to be entered in favor of the plaintiff for the relief demanded in the complaint.

Let judgment be entered accordingly.

Judgment accordingly.

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THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v. DUNCAN YOUNG, Defendant.

(Supreme Court, Kings Special Term, March, 1903.)

Crimes — Certificate of reasonable doubt as to a conviction of murder in the second degree — Erroneous charge as to homicide — Insistence of the trial court upon a verdict.

A proper case for the issue of a certificate of reasonable doubt as to whether a judgment should stand convicting a defendant of murder in the second degree in having, after attempting to pry open a window in the night time in the rear of a house to commit burglary, and while trying to escape through the rear yards of the block, killed some ten minutes later a man who was trying to prevent him from escaping by a fire escape on the rear of another house on the opposite side of the block, is presented where the trial judge refused to instruct as to manslaughter, and charged that at the time of the homicide defendant was attempting to commit a burglary, although he had desisted therefrom and was fleeing.

The conduct of the trial judge, in twice sending for the jury without their having asked for any instruction or having communicated with the court, and in volunteering to further instruct and help them, and telling them that a disagreement would be a miscarriage of justice, and urging upon them the expense of the trial as a reason for agreeing, and other like considerations, considered a further reason justifying a certificate of reasonable doubt.

APPLICATION for a certificate of reasonable doubt on a conviction of murder in the second degree in the Court of General Sessions in the county of New York.

Lewis S. Chanler for application.

Robert C. Taylor, Assistant District Attorney, opposed.

GAYNOR, J.: The defendant was tried for murder in the first degree. The evidence tends to establish the following facts: A man was discovered in the night-time in the act of forcing open

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a second story rear window of a house, and tried to escape. He was hunted over the rear fences from yard to yard by the police and the awakened residents of the block. As he dodged about from one point of concealment to another, searching for a point of exit, he was pelted with missiles, and also shot at with pistols seven or more times. At the last he ran up a rear fire escape to get away from a woman with a pistol. She shot at him twice from below as he went up, and a man leaned out of a window above and struck at him with a stick or board. He shot and killed the latter, and continuing up the fire escape to the story above, entered a window and made his escape through the house to the street. This was on the opposite side of the block from the house he had been discovered trying to enter, and the pursuit had lasted a considerable time, apparently more than ten minutes.

The defendant was arrested some days later, charged with the homicide. The evidence against him on the trial consisted of alleged admissions freely made by him before his arrest to his paramour and his former paramour that he was the guilty person, the occasion thereof being the arrest of another person for the homicide; and also of his identification after his arrest by a woman who had seen him while he was being hunted in the back yards on the night of the homicide, as already described, and by another woman who had seen him in the street in the vicinity that same night before the said attempt to commit burglary was discovered.

The said evidence was by no means conclusive, being to some extent suspicious and uncertain. It called for special care on the part of the court and jury. The jury had much difficulty in accepting it as safe, and remained out over night. Next morning the learned trial judge brought the jury into court and spoke to them at length, although they had not asked for further instruction, or communicated with the court at all. He told them it was very unfortunate they had not agreed. He urged the importance of the case, the length of time the trial had taken, the expense of public money which it caused, which he said "no one can figure or realize", the mental strain of the "parties engaged" in it, and the loss of the jurors' own time, as reasons why they should not fail to agree. He invited any juror to ask him questions so that he could aid them to an agreement.

About two hours afterwards the learned trial judge sent for the

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jury again, and spoke to them at length, although they had not meanwhile asked for any instructions, or sent any communication to the court. They were called away from their deliberations, and the first words of the learned trial judge to them were:

"I have sent for you again. I want to repeat to you what I said this morning, that your failure to agree results in a very great waste of public time and money, and a miscarriage of justice, in an unnecessary infliction on the defendant, and the infliction of a very large and unnecessary amount of labor on the district attorney. If there is any possibility of your agreeing, I will keep you together further. It does seem to me that this case is not one that presents a proper reason for a disagreement."

It seems to me a matter of reasonable doubt, at least, whether it was not a substantial error to disturb the deliberations of the jury with such admonitions as these, which certainly put them under pressure. It is not always a reproach to a jury to disagree; sometimes it is a wholesome outcome; and considerations of work, time and expense should not influence a jury, especially in so grave a case. Such considerations in the jury room to influence a verdict would be illegal. Some have the erroneous notion that such a trial is a great expense to the public, and jurors might be influenced by that fact being urged upon them, whereas it is usually of little expense, as this trial apparently was.

The effect of these remarks to the jury must have been enhanced, it seems to me, by what followed. The learned trial judge urged the jury to "point out any particulars of law or fact that is troubling you", so that he might by his instruction remove the trouble. The jury had not sent for any instruction, nor did they now ask for any. The foreman responded that he thought the evidence was understood perfectly well, and that "it was merely a matter of opinion that different jurors gave to the evidence, that is, the weight they give it."

Nevertheless, the learned trial judge called upon each juror separately and in succession to state if he did not "desire any information", and each responded in the negative. At this point the district attorney interposed and said that it occurred from time to time that there could be an honest difference of opinion, and that "we should be loath to coerce a verdict, where there is an honest difference of opinion."

It seems to me a matter of reasonable doubt whether the put-

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ting of such a stress upon a jury, not only collectively but by a specific call upon each, is not substantial error.

On the counsel for defendant taking an exception to "each and every question propounded to the jury", the learned trial judge said: "I will withdraw them all. I do withdraw them all, and direct the jury to pay no attention to them." But I suppose the question of whether this was a cure remains a doubtful matter.

The learned trial judge charged the jury that they should find the defendant guilty of murder or nothing, and refused the request of the defendant's counsel to instruct them as to the law of manslaughter. When the way the defendant was being hunted, as already described, is considered, and that he was being fired at, or had just been fired at twice, from the yard below the fire escape, while the deceased was striking at him with a stick from above, and he may have been in peril of being knocked off the fire escape and shot, it is difficult to see how the trial judge had the right to decide as matter of law that he may not have lacked an intent to kill; and such intent was a necessary element of murder, unless at the time of firing the fatal shot the defendant was, within subdivision 3 of the section of the Penal Code which defines murder in the first degree (§ 183), "engaged in the commission of, or in an attempt to commit, a felony", etc. The learned trial judge charged the jury that he was so engaged if they found that he was the person who had been discovered at the beginning attempting to force open the window, provided he intended to enter to commit a burglary. But he was not at the time of the homicide so engaged. On the contrary, he had desisted, and was a considerable distance away, viz., on the other side of the block, trying to escape. If he can be said to have been still engaged in the burglary, how far would he have had to get away before he would not be engaged in it?

Let the certificate issue.

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CHARLES H. COLE, Plaintiff, *v.* THE PREFERRED ACCIDENT INS. CO. OF NEW YORK, Defendant.

(Supreme Court, Kings Trial Term, March, 1903.)

Accident insurance — Presumption of payment of premium — Waiver of proofs of death — Limitation of the right to sue — Policy when construed favorably to the insured.

Possession by the insured at the time of his death of a policy of accident insurance raises a presumption that he had paid the premium.

The insurer's immediate repudiation of any liability under the policy excuses compliance by the beneficiary with a condition antecedent to a recovery that proofs of death must be furnished within two months of the date of death.

A proviso of the policy that "No legal proceedings for a recovery hereunder shall be brought within three months after the receipt of such proofs at the office of said Association, nor at all unless begun within six months from the date when said Association shall have received such proof" must be strictly construed; and cannot, where service of proofs of death has been thus excused, be deemed a limitation of the time to bring an action.

An insurance policy, when susceptible of two constructions, must be construed in the way most favorable to the insured.

ACTION to recover for death by accident on an accident insurance policy for $5,000. The policy was dated August 10, 1892, and the death occurred September 29, 1892. Only the first premium had accrued.

At the close of the evidence for both sides counsel for defendant claimed there was no question of fact and moved for a direction of a verdict for defendant.

Plaintiff's counsel claimed there were three questions of fact for the jury, and the court submitted the same to the jury, and received a special verdict in favor of the plaintiff thereon, finding (1) that notice of the death by accident was given as required by the policy, (2) that the defendant in answer thereto replied that the policy was void, and that there was no liability thereunder, for the reason that the premium had not been paid, and (3) that

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the beneficiary believed the said statement and was induced thereby to neglect to furnish the defendant with formal proofs of death within three months after the accident as required by the policy.

All other questions were left to the court, and both sides moved for judgment on the special verdict.

I. R. Oeland for plaintiff.

W. G. Wilson for defendant.

GAYNOR, J.: At the close of the evidence the defendant claimed that there was no question of fact for the jury and moved for a direction of a verdict in its favor. The plaintiff claimed that there were three questions of fact. A special verdict was taken thereon, and the finding was in his favor. This left all other questions of fact, if there be any, to the court, as well as the questions of law; and both sides moved for judgment on the special verdict. There are three questions to be passed upon.

1. The plaintiff introduced no direct evidence to show payment of the first premium (the only one which had accrued, the policy being dated August 10, 1892, and the death happening on September 29th next following). But the fact that the deceased had possession of the policy at the time of his death made out a presumption of payment of the premium; and this presumption was not as matter of law overcome by the evidence for the defendant. Both sides left the question of payment of the premium to the court instead of submitting it to the jury.

2. The policy contains a requirement that formal proofs of death from accidental causes should be furnished to the company within two months after the date of death, as a condition precedent to a right of action to recover upon the policy. Such proofs were not furnished; but the claim of the defendant, made immediately on receipt of notice of the death by accident (given as required by the policy), that it was not liable on the policy at all, was a waiver thereof (Joyce on Ins. §§ 3257, 3373).

3. The policy also contained the following provision, based on the said formal proofs of death:

"No legal proceedings for a recovery hereunder shall be brought within three months after the receipt of such proofs at the office of said Association, nor at all unless begun within six

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months from the date when said Association shall have received such proof."

This three months postponement of the right to sue, and six months limitation thereof, is predicated on the receipt of such proofs. But in this case they were not furnished to the defendant, having been waived by it. Such limitation was therefore never set running, any more than such postponement was brought into operation. It has to be construed strictly (May on Ins. 4th ed. §§ 449, 491; Griffey v. New York Cent. Ins. Co., 100 N. Y. 417; State Ins. Co. v. Maackens, 9 Vroom 564). There is no provision in the contract that if such proofs be waived and not furnished, the limitation shall start from the date of death, or of such waiver, and it cannot be imported into it (Boynton v. Middlesex Fire Ins. Co. 4 Metc. 212; Landis v. Home Mut. Fire Ins. Co. 56 Mo. 591; Bartlett v. Union Mut. Fire Ins. Co. 46 Me. 500; Williams v. Ins. Co. 29 id. 465; May on Ins. § 491). Our Court of Appeals has said in respect of a similar limitation, without having to decide the question, viz.: "It is at least doubtful whether in strictness the limitation applies except in case an award is made fixing the amount of the claim" (Hay v. Star Fire Ins. Co. 77 N. Y. p. 242). Moreover, the policy is at best open to two constructions in the respect in question; and this requires, under a settled rule of construction applicable to insurance contracts, that the construction which favors the insured shall be adopted (Gough v. Davis, 24 Misc. Rep. 247; Darrow v. Family Fund Society, 116 N. Y. 537; May on Ins. § 175).

Judgment for the plaintiff for $5,000, with interest from September 30th, 1892.

THE AMERICAN SURETY COMPANY OF NEW YORK, Plaintiff, v. CHARLES E. COSGROVE, Defendant.

(Supreme Court, New York Special Term, March, 1903.)

Execution against the person — Place of his incarceration not his "residence" — Code Civ. Pro., § 1489.

A judgment debtor whose last place of sojourn within the State of New York, before being sent to the Elmira Reformatory in Chemung county, was the city of New York, cannot, while incarcerated,

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be deemed a resident of Chemung county and therefore an execution issued to that county during such period against his property and returned unsatisfied does not, within Code Civ. Pro., § 1489, entitle the judgment creditor subsequently to issue an execution against his person to the county of New York, now and formerly "the county where he resides", no execution having ever been issued to that county.

MOTION to set aside an execution against the person of the defendant.

The plaintiff obtained judgment for $15,391.65 against the defendant herein August 6, 1901, and on August thirteenth following issued execution against the defendant's property to the sheriff of Chemung county, the defendant being then confined in Elmira Reformatory, situated in said county. Said execution was returned unsatisfied.

The defendant was born in New York county, and the only time when he was absent from New York city for any considerable period was during his incarceration in Elmira Reformatory.

Section 1489 of the Code of Civil Procedure provides that unless the judgment debtor is actually confined by virtue of an execution against his person in another action, or of an order of arrest, or a surrender by his bail in the same action, an execution against his person cannot be issued until an execution against his property has been returned wholly or partly unsatisfied; and if the judgment debtor is a resident of the State the execution against his property must have been issued to the county where he resides.

On January 30, 1903, the defendant was arrested by the sheriff of New York county, under an execution against the defendant's person issued to said sheriff, and confined in Ludlow Street jail.

No execution against the defendant's property had been issued to New York county.

Thomas F. Keogh, for motion.

Henry C. Willcox, opposed.

BISCHOFF, J. The issuance of execution against the defendant's property to the county of Chemung, as the place where he at the time resided, is sought to be justified solely upon the fact that

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the defendant was within that county as a prisoner in the Elmira Reformatory, whither he was sent upon his conviction of a crime. Concededly, the last place of the defendant's sojourn within the State was the city of New York, and it is impossible to hold that, for the purposes of an execution against his person (Code Civ. Pro., § 1489), he "resided" where he was imprisoned. Whether the word "residence" be taken in the sense of domicile or of abode, it implies a place where the party is situated through choice, and where, in some conceivable matter, his personal belongings would be the more readily found; and it has been distinctly ruled that neither in its legal nor in its popular meaning is the word "residence" satisfied by an incarceration in any particular place. Grant v. Dalliber, 11 Conn. 234.

There was an absolute failure of compliance with section 1489 of the Code of Civil Procedure in that, before the issuance of execution against the person of the defendant, no execution against his property had been issued to the county of his residence. The execution against the defendant's person should therefore be vacated and he be given his liberty.

Motion granted, with costs.

GEORGE W. HOYT, Plaintiff, *v.* JOHN T. EASTON, Defendant.

(Supreme Court, New York Special Term, March, 1903.)

Partnership — Dissolution because one partner excluded the other — Money judgment as an incident to equitable relief — Apportionment of a bonus for being taken into a law partnership.

Where a lawyer of experience takes a young lawyer as a partner in consideration of a bonus or premium and thereafter excludes him from a knowledge of the details of the business and treats him with discourtesy, the younger lawyer may bring an action for a dissolution and in it the court may award him a money judgment for his share of the bonus, but this money judgment results only from the exercise of equitable jurisdiction in determining whether there should be a dissolution.

The bonus or premium should in such case be apportioned on the basis of the actual and of the agreed duration of the term, the senior partner to retain *pro tanto* for the time elapsed, the junior partner to be repaid the balance.

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Baldwin & Slater (Arthur J. Baldwin, of counsel), for plaintiff.

John T. Easton, in person.

BLANCHARD, J. The plaintiff and defendant are members of the bar of this State, and on or prior to January 1, 1900, entered into an agreement for the formation of a partnership for the practice of law. The defendant made certain representations to the plaintiff, who was a young and inexperienced member of the bar as to the extent of his (the defendant's) practice, and plaintiff paid to defendant in the shape of a bonus or premium for the privilege of being taken into partnership with the defendant the sum of $4,000, $2,000 of which was in cash and $2,000 in notes indorsed by the plaintiff. The plaintiff asks judgment for a dissolution of the partnership and for the return of the sum which he paid to the defendant. The defendant contends in the first place that this action is not one properly cognizable in equity, claiming it is simply an action to recover a sum of money. In this I think he is in error. An action for a partnership dissolution is a most familiar ground of equitable jurisdiction. If the dissolution be determined to be proper the money judgment may follow, but it follows only through the exercise of the equitable jurisdiction in ascertaining that the partnership should be dissolved. Fischer-Hansen v. Brooklyn Heights R. R. Co., 173 N. Y. 492; N. Y. L. J., March 5, 1903. I come next to a consideration of whether or not the plaintiff has sustained his contention that a dissolution of the partnership is proper, and I have reached the conclusion that he has. The plaintiff was known to the defendant to have had but little experience in the practice of law. He came into the defendant's office as a stranger, not familiar with the defendant's methods of doing business nor with the workings of his office. It is quite evident that almost from the start the treatment accorded the plaintiff by the defendant was not such as it should have been between two persons bearing the relationship of partners. Certain it is that in the month of April following the formation of the partnership the relations between the partners had grown so strained that the continuance of the partnership became a farce. It could not continue, and the plaintiff terminated it by leaving. The question to be determined is, Who was at fault? It would

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serve no useful purpose to enter into a discussion of the details of the life of this partnership. Between partners there should be confidence. There was none here. The defendant treated the plaintiff with but scant courtesy. The defendant concedes he may have spoken harshly to the plaintiff, but claims he was justified. I do not think so. Defendant should have considered plaintiff's inexperience. The defendant possessing the clientele, the knowledge of the law and the workings of the office failed to bestow any confidence in the plaintiff, and failed to put him in possession of the details of the office, which might have made him a useful member of the partnership and a colaborer in the work of the partnership. In my judgment the defendant was at fault and a dissolution should be decreed.

The plaintiff in this case waives any right to an accounting, which he may have, and asks in lieu thereof for the return of a proportionate amount of the bonus or premium which he paid to the defendant upon entering into the partnership. I am referred to no American authority where a return of a proportionate amount of the premium has been decreed upon a dissolution of the partnership. The principle has been worked out quite thoroughly in England, and is there well recognized, and I see no reason why it should not be adopted by our courts of equity. It is in accordance with the justice of a situation such as is presented in the present case. A premium of $4,000 was paid by the plaintiff to the defendant in consideration of the defendant entering into a partnership with the plaintiff for a period of five years. It is true plaintiff claimed that defendant made certain representations as to the extent of his income from his practice, and these were falsely and fraudulently made, but I find no proof to warrant this contention. The premium must, however, be assumed to have been paid in expectation of the continuance of the partnership for the term agreed upon, and where, as here, the expected benefit was not realized through the fault of one of the partners, and the other partner finds it necessary to terminate the partnership because thereof, and is justified in so doing, it would be inequitable to permit the partner at fault to retain the premium paid to him. The subject is well treated in Lindley on Partnership (p. 65 *et seq.*) and the notes to the second American edition will be found to contain the English authorities on the subject. It is there said: "If a person re-

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ceives a premium for taking another into partnership, which is to endure for a certain time, and then himself does anything which determines the partnership before that time has elapsed, he may be fairly considered as having precluded himself from insisting on his strict right to retain or be paid his whole premium," and again (at p. 68): "The tendency of modern decisions is to apportion the premium in these cases not only where neither partner is to blame, but *a fortiori* where the partner receiving the premium has so misconducted himself as to give the partner paying it a right to have the partnership dissolved." As to the amount to be returned (p. 69) "the rule generally adopted is to apportion the premium with reference to the agreed and actual duration of the partnership." See also Bates Part., § 802. The partnership endured for but one-fifteenth of the time agreed upon, and I therefore conclude that plaintiff is entitled to the return of fourteen-fifteenths of the premium paid.

Ordered accordingly.

CHARLES GMAEHLE, as Administrator, Etc., of CHARLES GMAEHLE, Deceased, Plaintiff, *v.* MORRIS ROSENBERG and BARNET AARONSON, Defendants.

(Supreme Court, New York Special Term, March, 1903.)

Employer's liability law, L. 1902, ch. 600 — Existing rights to recover for injuries not taken away — Complaint.

The employer's liability law (L. 1902, ch. 600) did not take away, whether or not causes of action had accrued thereon, rights existing under the Labor Law (L. 1897, ch. 415, § 18), for a violation of the provision forbidding an employer to furnish his employee an unsafe scaffold, nor did it take away any similar rights existing at common law.

L. 1902, ch. 600 merely extended the liability of an employer.

A complaint for employers' alleged negligence, in so erecting a scaffold that a plank in it gave way and caused the death of a bricklayer by precipitating him to the ground, is not made demurrable by failing to allege that notice of the accident had been given his employers, as required by L. 1902, ch. 600, § 2.

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DEMURRER to complaint.

Hillquit & Hillquit, for plaintiff.

David Steckler, for demurrer.

BLANCHARD, J. The complaint sets forth that the plaintiff's intestate, while in the defendants' employ as a bricklayer in the erection of a certain new building, was killed without fault on his part and through the defendants' negligence in the erection of a scaffold, where plaintiff's intestate was at work, it being charged therein that the scaffold was erected in a negligent, improper and unsafe manner, resulting in a plank giving way and falling out, throwing the plaintiff's intestate to the ground and causing his death. The defendants have demurred upon the ground that facts sufficient to constitute a cause of action are not stated. The defendants' theory of the action is that it is one brought pursuant to chapter 600 of the Laws of 1902, entitled "An act to extend and regulate the liability of employers to make compensation for personal injuries suffered by employees," and that the complaint is fatally defective in not alleging that notice of the accident had been given to the employer, as section 2 of that act requires. The plaintiff, however, denies that his action is brought under the act of 1902, but claims it is brought under and by virtue of section 18 of the Labor Law (Laws of 1897, chap. 415). This section of the Labor Law provides: "A person employing or directing another to perform labor of any kind in the erection, * * * of a house, building or structure shall not furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding * * * which" is "unsafe, unsuitable or improper, and which" is "not so constructed * * * as to give proper protection to the life and limb of a person so employed or engaged." There can be no doubt but that a cause of action is stated which would have been sufficient prior to the enactment of chapter 600 of the Laws of 1902, and the defendants do not question this, but contend that the law applicable to such actions as are provided for by the Laws of 1902 is entirely comprehended in that law, and that no action can be brought in compliance with that statute, even though the right existed prior thereto. This would give to the law of 1902 a con-

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struction which would in effect repeal not only section 18 of the Labor Law, but would take away causes of action existing at common law. The act of 1902 expressly states, however (§ 5): "Every existing right of action for negligence or to recover damages for injuries resulting in death is continued, and nothing in this act contained shall be construed as limiting any such right of action, nor shall the failure to give the notice provided for in section two of this act be a bar to the maintenance of a suit upon any such existing right of action." The defendants argue that "existing right of action" as there used means an accrued cause of action. I fail to find any justification for such a construction. In my judgment the effect of the act of 1902 was merely to extend the liability of the employer. It was not intended to take away rights of action then existing, whether the causes of action had accrued or not. The demurrer must be overruled, with leave to answer upon payment of costs.

Demurrer overruled, with leave to answer upon payment of costs.

RASHEED G. SALEEBY, Plaintiff, *v.* THE CENTRAL RAILROAD OF NEW JERSEY, Defendant.

(Supreme Court, New York Special Term, March, 1903.)

Pleading — Insufficient defenses in confession and avoidance.

Affirmative defenses, in the nature of pleas in confession and avoidance, are bad where they confess nothing and admit only hypothetically.

Where such defenses insufficiently deny the allegations of the complaint it must, on demurrer, be taken to be true and the defenses, in view of their admissions, be held insufficient to avoid liability.

DEMURRER to affirmative defenses in defendant's answer

Kelly & Hoeninghaus (J. Allison Kelly, of counsel), for demurrer.

De Forest Brothers (Robert Thorne, of counsel), opposed.

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BLANCHARD, J. Demurrer by plaintiff to affirmative defenses in defendant's answer. The complaint sets forth a cause of action for the loss by defendant, a common carrier, of plaintiff's baggage delivered to defendant after notice of the nature and value thereof and its purpose and necessity to plaintiff upon his journey, and defendant accepted and agreed to safely carry and deliver it, which it failed to do. The answer contains two affirmative defenses, which are demurred to, to the following effect: *First,* that the ticket sold to plaintiff, if any, and upon which, if at all, plaintiff's baggage was received, contained an express condition limiting the defendant's liability, and that notices to the same effect were posted in defendant's baggage office, and that plaintiff's baggage was received by it, if at all, upon such limitation; and the *second* is to the effect that the law of New Jersey governs the contract, if any, and that by virtue of such law defendant's liability was limited. These affirmative defenses are in the nature of pleas in confession and avoidance. They, however, fail to confess anything. The allegations which should be admissions are hypothetical in their nature. Great pains have been taken to avoid confessing anything. Whenever a positive allegation is made it is immediately followed by "if," and its effect as a confession or admission is nullified. The pleadings of these defenses are bad, and the demurrer should be sustained because thereof. Conger v. Johnston, 2 Den. 96; Goodman v. Robb, 41 Hun, 605. I think the affirmative defenses are further faultily pleaded in that they fail to contain any sufficient denial of the allegations of the complaint, which, under such conditions, must for the purpose of this demurrer be taken as true. In view of these admissions, the defenses become ineffective to avoid liability. I cannot take into consideration allegations of denial formerly in the answer, but now eliminated. I must consider the pleadings as they are now presented to the court. If the defendant felt aggrieved by reason of some former decision, it had its remedy by appeal. It should not now complain of it, after abiding by it. Defendant should have an opportunity to plead properly, and the demurrer will be sustained, with costs, with leave to plead anew upon payment of such costs.

Demurrer sustained, with costs, with leave to plead anew upon payment of costs.

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SAMUEL PHILIP MENDEL, ANSEL OPPENHEIM, CARRIE LEVIS, as Executors and Trustees, Etc., of JENNIE SCHULHOFF, Deceased, Plaintiffs, *v.* ARTHUR LEVIS et al., Defendants.

(Supreme Court, New York Special Term, March, 1903.)

Trust — Executors when trustees by implication — Separate trusts — Implied imperative power of sale — Equitable conversion — Suspension of the power of alienation — Separable invalid trust cut off.

Where a testatrix, having thirteen nephews and nieces, gave and bequeathed her residuary estate, consisting of realty and personalty, to them in equal shares payable at the age of twenty-five, directed her executors to invest, in the meantime, the share of "each" in first-class securities, and, until each reached twenty-five years, pay the income to the testatrix' sisters, the court determined, in an executors' action to construe the will brought after two of the nephews and nieces had reached the age of twenty-five and had demanded payment of their legacies, first, that the executors were impliedly created trustees, up to the period of distribution, and of thirteen separate trusts; second, that by implication they had an imperative power of sale; third, that there was a consequent equitable conversion of realty into personalty; and, fourth, that the said two legatees were entitled to present payment.

A further provision of the will that "in case any of said legatees die before reaching the age of twenty-five years then his or her share shall be distributed amongst the survivors on arriving at said age" was declared void, first, for suspending the power of alienation for a definite period of time and, second, for suspending it for more than two lives in being at the death of the testatrix.

An invalid provision of a will may be cut off where it does not affect the primary purpose of the will and that purpose is valid.

ACTION for the construction of a will.

Edgar A. Levy, for plaintiffs.

Wolf, Kohn & Ullman (Joseph Ullman, of counsel), for guardian *ad litem* and defendants Leonard Levis and others.

Morris Cooper, for defendant Selma Levy.

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CLARKE, J. Action by executors, etc., to construe a last will and testament. Jennie Schulhoff, testatrix, died on the 27th of October, 1899, leaving a will and codicil which were duly admitted to probate. After providing for a number of specific bequests the will proceeded as follows: "Thirteenth; I give and bequeath all the rest and residue of my property to the following-named nephews and nieces, to be distributed in equal shares, to wit: Arthur Levis, Irving Levis, Charles Levis, Regina Levis, Leonard Levis, the children of Mrs. Carrie Levis; Ella Oppenheim, James Oppenheim, Ramsay Oppenheim, Robert Oppenheim, Helen Oppenheim, Doretta Oppenheim, the children of Mrs. Mathilda Oppenheim; Selma Levy, Austin Levy, the children of my sister, formerly known as Johanna Levy. This property, so devised, shall be held by my executrix and executors, invested in first class securities, and the share of each of said children shall be paid only to him or her on reaching the age of twenty-five years, and in case any of said legatees die before reaching the age of twenty-five years then his or her share shall be distributed amongst the survivors on arriving at said age. The income of the property so devised from the time of my death up to the date of distribution shall be paid by my executors to Mrs. Carrie Levis and to Mrs. Mathilda Oppenheim in equal proportions, it being understood that only the share of the principal shall be paid to the said legatees on arriving at the age specified, in which case the income on such amount so paid over shall cease to be paid to Mrs. Carrie Levis and Mrs. Mathilda Oppenheim. Fourteenth. In case of the death of either of said nephews and nieces above mentioned, entitled to share in the distribution of the rest and residue of my property before reaching the age of twenty-five years, leaving issue, then the share to which he or she would be entitled had he or she been living shall in such a case be paid over to such issue in equal proportions, or to the guardian of such children." The residuary estate consists of both real and personal property. All the said legatees are alive. Two of them having arrived at the age of twenty-five years have demanded of the executors the payment of their legacies, and the executors being in doubt as to the legality and proper construction of said provisions of the will have brought this action. Though inartificially drawn the scheme of the will is clear. The executors were created trustees, in whom were vested thir-

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teen separate and clearly expressed trusts. "The executors were given a trust estate in the property, for the purposes named in the will. * * * It would be otherwise impossible for them to pay the annuities provided for by the will * * * and discharge the other duties conferred as to the real and personal estate. The implication is, therefore, effective that the testator intended they should take title." United States Trust Co. v. Maresi, 33 Misc. Rep. 539, citing Morse v. Morse, 85 N. Y. 53. The language and general scheme of this will raise an implied and imperative power of sale in order to carry out its provisions. This being so, there was an equitable conversion of the real estate into personalty. The general principle is clearly established by the authorities that the power of sale need not be express, but may be implied when it is evident from an examination of the entire will that otherwise the testamentary scheme would be defeated. Salisbury v. Slade, 160 N. Y. 278. Thus was vested in the executors, the legal estate of all testator's residuary property, and it must continue to reside in them until the purposes of the trust, if legal, shall be accomplished. Underwood v. Curtis, 127 N. Y. 537. The executors were vested with the residuary estate carved into thirteen separate trusts, each of which was to continue until the specific legatee should arrive at the age of twenty-five, when he or she would receive his legacy, the income of all the trust estates in the meanwhile being paid share and share alike to the two sisters of testatrix. These provisions are clear and valid. But that portion of paragraph XIII which provides "in case any of said legatees die before reaching the age of twenty-five years, then his or her share shall be distributed amongst the survivors on arriving at said age" is void, as it creates an unlawful suspension of the power of alienation, first, for an absolute period of time, and, second, for more than two lives in being at the time of the death of the testatrix. But said provision is not so connected with the primary intention of this will that its invalidity will affect said valid portions. The intention was to give the income to testatrix' sisters until each of the children arrived at the age of twenty-five, then said child was to receive its share. If it died before reaching that age, leaving issue, that issue immediately took its parent's share. So much is valid. The provision for the distribution of any child's share dying without issue before reaching twenty-five is invalid,

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but the invalid disposition would only have gone to swell the share already carried out and provided for — the primary object of the will. That is not to be destroyed by this subsequent clause providing for a contingency which may never happen. It may be cut out without at all affecting the valid provisions. It would seem as if under that contingency the share of the legatee dying without issue before twenty-five is undisposed of by the will, but as that is a mere academic question at the present time it is unnecessary to decide it. The executors are warranted, and it is their duty, to pay to the two legatees who have arrived at the prescribed age their legacies.

Settle decision and award judgment upon notice.

Costs are awarded to all parties who have appeared, and answered, payable out of the estate.

Judgment accordingly.

CARRIE POLLAK, Plaintiff, *v.* THE SUPREME COUNCIL OF THE ROYAL ARCANUM, Defendant.

(Supreme Court, New York Special Term, March, 1903.)

Benefit insurance — When the beneficiary's rights vest — Action by her to reinstate a suspended policy where the insured was not shown to be dead.

Under a policy of benefit insurance, securing to the beneficiary, a wife, upon the death of the insured, her husband, a certain sum in a widows and orphans' benefit fund, and also reserving to him the right arbitrarily to change the beneficiary at any time, she has no vested rights in the fund until he dies.

Therefore, where he has merely disappeared, she has no title upon which to maintain an action, "to reinstate with full force and effect" the policy, designed to test the validity of the legislation and action of the benefit order under and by which it, after his disappearance, passed a law requiring a member to report to the council within six months after receipt of a notice sent by registered mail to his last known place of residence or, in the alternative, be suspended, and then suspended him when, after such notice and within six months thereafter, he failed to report to the council.

While the husband is living he alone can test the validity of his suspension.

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ACTION to reinstate a benefit certificate.

Milton Mayer, for plaintiff.

Arthur C. Salmon, for defendant.

GREENBAUM, J. The defendant is an incorporated membership fraternal society. One of its defined objects is the following: "5th. To establish a Widows and Orphans' Benefit Fund, from which on the satisfactory evidence of the death of a member of the order, who has complied with all its lawful requirements, a sum not exceeding three thousand dollars shall be paid to the wife, children, relatives of or persons dependent upon such member as limited and described in the laws of said order relating to Benefit Certificates, as he may direct in accordance with said laws."

On February 12, 1890, Edward Pollak, husband of the plaintiff, became a member of the defendant corporation, which thereupon duly issued to him its benefit certificate as such member, which, among other things, contains a provision that, subject to a compliance with certain conditions therein mentioned, "it hereby promises and binds itself to pay out of its Widows and Orphans Benefit Fund" to the wife of the said Edward Pollak, the above-named plaintiff, "a sum not exceeding three thousand dollars in accordance with and under the provisions of the laws governing said fund."

On or about August 30, 1896, Edward Pollak, being then in good standing as a member of the defendant corporation, disappeared from his home, and he has not since been heard from and it is not known whether he is now living or dead.

After the disappearance of Edward Pollak the plaintiff regularly paid all assessments and dues, payable to the defendant by reason of said Edward Pollak's membership, and the defendant, with full knowledge of the fact of his disappearance, accepted said assessments and dues until in or about March, 1902, when the defendant refused to accept any further moneys, although duly tendered by the plaintiff.

Defendant's refusal to accept any further dues and assessments was based upon the following facts: After the disappearance of Edward Pollak the defendant corporation enacted a law relating to members who shall have disappeared, which provided,

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among other things, that upon the failure of a member to report to the council within six months after receipt of a notice sent by registered mail to his last known place of residence, that said member shall stand suspended from all rights, benefits and privileges of membership.

The new enactment also provided that "if it shall be proven to the satisfaction of the Supreme Secretary, Examiner of Claims and Supreme Regent that such member died before the date upon which he stood suspended, his benefit should be paid according to the laws of the order."

The defendant, in accordance with the foregoing provisions of its laws, duly pursued the method therein outlined with respect to Edward Pollak, and, at the expiration of the six months, after the sending of the notice as therein required, not having received any report from him, it regarded him as suspended from membership and treated his contract with the defendant, annulled and forfeited.

Plaintiff, as the wife of Edward Pollak and as the beneficiary named in the aforementioned benefit certificate, brings this action to compel "the defendant to reinstate with full force and effect the policy or benefit certificate issued by it on the 12th day of February, 1890, on the life of Edward Pollak payable to Carrie Pollak," the plaintiff.

It has been repeatedly held that the relations existing between a mutual benefit society (such as defendant's) and its members are purely contractual as between them.

By the terms of the contract between the defendant and Edward Pollak it was concededly the latter's right and privilege to change his beneficiary at any time, without assigning any reason for said change. It is, therefore, clear that the plaintiff had no vested interest in the benefit certificate and that she merely held a naked expectancy, subject to revocation at any time during the life of her husband. Sabin v. Phinney, 134 N. Y. 423; Southwell v. Gray, 35 Misc. Rep. 740; Bankowitz v. Bankowitz, N. Y. L. J., May 12, 1896.

The vitality of the benefit certificate, by its terms, depended upon the good standing of the member to whom it is issued. If the membership is lost or destroyed the force of the benefit certificate is gone. True, the membership can only be forfeited in a lawful manner, and if the corporation by pursuing illegal methods

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or by passing laws or regulations, which are unreasonable or unfair, attempted to forfeit the rights of a member, redress through the courts is open to the member thus unjustly treated. The only person, however, who can complain of the improper or unlawful act is the member. If he chooses to waive his rights or decides to abide by the acts of the society, he may do so arbitrarily or whimsically, because the contract is solely between him and the society.

The theory upon which this action is brought is that Edward Pollak was alive when the benefit certificate was declared forfeited, otherwise there would be no purpose in seeking to reinstate it. If Edward Pollak was then dead the defendant's acts were nugatory, and, indeed, it is expressly declared in the enactment relating to disappearances, as already shown, that if the "member died before the date upon which he stood suspended his benefit shall be paid according to the laws of the order."

It must therefore follow that if Edward Pollak was alive at the time of his suspension as a member, or if he is still alive, he alone can raise the question of his alleged unlawful suspension by the defendant.

If he was then dead the rights of the plaintiff became vested as the beneficiary named in the benefit certificate, and her remedy would be to sue upon the certificate, should the defendant unjustly refuse to meet its obligations thereunder.

It will be noticed that the plaintiff does not attempt to have Edward Pollak reinstated as a member, but the relief sought is to re-establish the validity of the benefit certificate. The plaintiff thus apparently recognized that she had no standing in court to have Edward Pollak restored to membership, but she proceeded upon the theory that the benefit certificate stood independently of the membership by reason of certain rights that she had in the certificate. It has, however, been shown that the life of the benefit certificate is necessarily dependent upon the existence of a membership, and that she has no vested interest in the certificate until the death of her husband, and then only provided he has not changed the beneficiary, and hence it follows that the plaintiff has no standing in a case like the one here brought.

It is, of course, not intended by this decision, to conclude any rights the plaintiff may have in any action which she may deem proper to bring against the defendant upon the theory that her

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husband is dead, and it is not here intended to determine the question of the reasonableness of the enactment of the defendant relating to disappearances. I place my decision solely upon the ground that the plaintiff cannot maintain a cause of action such as she here has brought and that the complaint must for that reason alone be dismissed without prejudice to any new action that she may be advised to bring.

In view of the peculiar facts here disclosed the dismissal will be without costs.

Complaint dismissed, without costs.

THOMAS C. STEPHENS, Plaintiff, *v.* JOHN JACOB FLAMMER et al., Defendants.

(Supreme Court, New York Special Term, March, 1903.)

Judicial sale — Purchaser need not complete where the validity of the title depends upon a disputable question of fact.

A purchaser upon a judicial sale should not be compelled to complete where the validity of the title depends upon a question of fact the proof as to which, made on the application, might be changed on a new inquiry or is open to opposing inferences.

He should not be compelled to complete unless it is clear beyond a reasonable doubt that he will receive what he contracted to buy.

MOTION to compel a purchaser on foreclosure to take title.

Arnstein & Levy (Samuel Levy, of counsel), for purchaser.

James E. Carpenter (Gratz Nathan, of counsel), for plaintiff.

LEVENTRITT, J. I am of the opinion that the purchaser should be relieved. The validity of the title depends on a disputed question of fact not determined by the judgment in this action, and not such a mere possibility or remote or improbable contingency as to warrant the assertion that it has no probable basis.

It is unnecessary to recite in detail the long history of facts respecting this property. It is substantially set out, up to the point of foreclosure, in the opinion of Mr. Justice Greenbaum in Mayer v. Flammer, N. Y. L. J., Aug. 15, 1902. A few salient features will here prove sufficient. The property was originally

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owned by one Elizabeth Meyer, who devised it to her son. He predeceased his mother, but a posthumous daughter being born to his wife, the daughter's heirship was established in appropriate proceedings resulting in a decree in the Surrogate's Court. The property thus became vested in the daughter Margaret or Margaretta Meyer. The disputed question of fact is whether this daughter died leaving her mother her heir, through whom the property by conveyances and operations of law ultimately reached the defendant or whether she is now living as a claimant and owner of the property foreclosed. It is claimed that Annie F. Meyer, the mother of the heir Margaret Meyer, took her to Philadelphia shortly after birth and that she died en route. Various affidavits, including the coroner's certificate, are before the court to show the death. It may be remarked in passing that there is considerable confusion in the various spellings of the names of both mother and child in these papers, and that the mother's name is signed "Mayrs" and not "Meyer" as it was in fact. It is further claimed that upon Annie F. Meyer's return from Philadelphia she secured — for reasons not apparent — a foundling which she passed off as Margaret Meyer.

Shortly after her return Margaret Meyer, by her mother Annie F., as guardian *ad litem,* began one action to recover the possession and another to recover the rents of the property here involved against the predecessors in title of the defendants, who claimed the same as heirs of Elizabeth Meyer on the theory of her sons predeceasing her without issue. Annie F. Meyer, having died, left one piece of her real estate to her daughter, whom she designated in her will as Margaretta Pearl Meyer, and the balance to her sister, Maggie Smith. Maggie Smith thereupon made an application to the court to be substituted as sole plaintiff in the actions brought to recover possession and the rents of the property in suit. The papers presented to the court showed that both Annie F. Meyer and her daughter Margaret had died, and that Annie Smith was by devolution the sole owner. No reference was made to the alleged substitution of a foundling bearing the name of Margaretta Pearl Meyer, nor that it was then still alive. Although these papers showed that the infant Margaret had died ten months before the suit in her behalf had been begun, an order of substitution was nevertheless entered. Maggie Smith then, as sole plaintiff, on the same day consented to a dis-

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continuance of the action, with costs against herself, and shortly thereafter quitclaimed all her right, title and interest in or to the property to the defendants. These latter gave the mortgage which has been foreclosed.

It is quite obvious, therefore, that the validity of the title in the defendants is entirely dependent on the fact whether Margaret Meyer, the daughter of John F. Meyer, predeceased her mother, through whom the defendants claim.

The plaintiff insists that his papers conclusively show that Margaret Meyer is in fact dead. No record evidence is offered. It is true that on a motion made by one Margaretta Pearl Meyer, claiming to be the living child of John F. and Annie Meyer, to vacate the orders of substitution and discontinuance referred to, on the ground that they were void and illegally entered, Mr. Justice Greenbaum denied the motion on the ground that on the papers presented to him the applicant showed herself a stranger to the proceeding. He stated that in his opinion he was "reasonably certain" that the Margaret Meyer, who was the heir of John F. Meyer, was in fact dead, and that the applicant was the substituted foundling. Reduced to its last analysis the plaintiff's case rests on the defective affidavit proof of the death of an infant of a similar name en route to Philadelphia with her mother, who signed herself "Mayrs" and not "Meyer," and on the conclusion reached by Mr. Justice Greenbaum. But obviously none of this proof, so called, is binding on the real Margaret if she is in fact alive. This was recognized in the decision of Mayer v. Flammer, of which the concluding words are: "I have the less hesitancy in denying this motion * * * because any rights that the applicant may have will not be affected by this decision, but may be preserved and enforced by an action which will afford complete remedy."

The situation then is this. There is at present living one who claims to be the child of Annie and John F. Meyer. She has already sought to intervene and to that extent has attempted to assert her rights; her nonsuccess on that motion is in no wise conclusive on the question whether or not she is the child she claims to be, and will in no wise be binding on her in any form of action she may choose to adopt. Even though I should, on the same papers, be of the same opinion as the justice who decided the motion, yet that would not justify compelling the pur-

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chaser to take and defend by litigation a title which may be ousted by a paramount one. There is in this case more than the mere remote possibility of a claim or suit. The claimant has already been active by seeking to intervene. Her ultimate success depends purely on the resolution of a disputed question of fact as to which there is no judgment or other record evidence, but which is dependent for its best testimony on affidavits which on a trial would have to be replaced by oral testimony. The papers by no means make out a clear case. There is much that is peculiar and unexplained in the lists of births and deaths, wills, transfers and cross-transfers. The relation between them while not always apparent on these papers may on a thorough sifting and investigation place the facts in an entirely different light and show a relation where none now seems to exist. The burden should, however, not be placed on the purchaser. Unless Margaret Meyer died before her mother the title tendered is bad. "It would especially be unjust to compel a purchaser to take a title, the validity of which depended upon a question of fact, where the facts presented upon the application might be changed on a new inquiry or are open to opposing inferences." Fleming v. Burnham, 100 N. Y. 1. The purchaser should not be compelled to take the risk involved in the doubt as to a disputed question of fact. Vought v. Williams, 120 N. Y. 259. In this case I am not satisfied that it is clear beyond a reasonable doubt that the purchaser will receive what he contracted to buy. Vought v. Williams, *supra;* Shriver v. Shriver, 86 N. Y. 575.

In denying this motion I have rested my decision solely on the doubt arising under the disputed question of fact, without considering the other serious question raised, how far the discontinuance of the action for the possession of the property involved in this suit removed the cloud which its pendency cast over the title to the property.

Motion denied, with ten dollars costs, and purchaser relieved as prayed for.

Motion denied, with ten dollars costs.

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THE PEOPLE ex rel. ROBERT M. MILES, JR., Relator, v. THE MONTREAL AND BOSTON COPPER COMPANY, LIMITED, ALEXANDER MONROE and GEORGE H. MONROE, Associated Under the Name of MONROE & MONROE, Transfer Agents of THE MONTREAL AND BOSTON COPPER COMPANY, LIMITED, Respondents.

(Supreme Court, New York Special Term, March, 1903.)

Foreign stock corporation — Keeping and exhibiting a stock book — Refusal of inspection — Peremptory mandamus.

Within the Stock Corporation Law (L. 1892, ch. 688, § 53, as amd. L. 1897, ch. 384, § 3) requiring every foreign stock corporation "having an office for the transaction of business in this state" to keep therein a stock book and have it open for stockholders' inspection daily during business hours, an office of the stock transfer agents of such a corporation maintained in the city of New York is one "for the transaction of business in this state" and there the corporation must deposit and exhibit the book and may be compelled to do so by mandamus.

A "refusal" to permit a stockholder inspection is sufficiently made out where the transfer agents or those in charge of that office have for a month met, with evasive answers only, the stockholder's repeated demands for an inspection.

APPLICATION for a peremptory writ of mandamus.

Dos Passos Bros. (John R. Dos Passos, Edmund F. Harding, of counsel), for relator.

Hatch, Keener & Clute (William A. Keener, of counsel), for respondents.

LEVENTRITT, J. This is an application for a peremptory writ of mandamus requiring the respondent Montreal and Boston Copper Company to deposit and keep open for inspection in its office, or the office of the respondents Monroe & Monroe, its transfer agents, its stock-book in accordance with the provisions of section 53 of the Stock Corporation Law (L. 1892, ch. 688, as amd. by L. 1897, ch. 384, § 3).

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That section provides: "Every foreign stock corporation having an office for the transaction of business in this state, except moneyed and railroad corporations, shall keep therein a book to be known as a stock-book, containing the names, alphabetically arranged, of all persons who are stockholders of the corporation, showing their places of residence, the number of shares of stock held by them respectively, the time when they respectively became the owners thereof, and the amounts paid thereon. Such stock-book shall be open daily, during business hours, for the inspection of its stockholders and judgment creditors, and any officer of the state authorized by law to investigate the affairs of any such corporation. If any such foreign stock corporation has in this state a transfer agent, whether such agent shall be a corporation or a natural person, such stock-book may be deposited in the office of such agent and shall be open to inspection at all times during the usual hours of transacting business, to any stockholder, judgment creditor or officer of the state authorized by law to investigate the affairs of such corporation. For any refusal to allow such book to be inspected, such corporation and the officer or agent so refusing shall each forfeit the sum of two hundred and fifty dollars to be recovered by the person to whom such refusal was made."

On this application there is no material dispute as to the facts. The respondent Montreal and Boston Copper Company is a foreign corporation engaged in the business of mining. The respondents Monroe are, under their firm name of Monroe & Monroe, the transfer agents of the mining company, with an office at 25 Broad street in this city. One of the members of the firm is its secretary-treasurer. The relator is a stockholder. His certificates of stock read that the shares are transferable only in person or by attorney on the books of the company upon surrender of the certificate.

Numerous demands, oral and written, were made by the relator at various times in the course of a month, always during ordinary business hours, for an inspection of the stock-book, describing it in the terms of the statute. One of these demands was made of the president of the company, at a time when he was present in the office of the transfer agent sitting behind a desk, and who stated that at that time the book was "at the head office in Montreal"; another was made in writing of George H. Monroe, the

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member of the firm who is likewise secretary-treasurer of the company; frequent demands were also made of one Curtis, who was at all such times in charge of the office of the transfer agent and who stated on one occasion that that was not the "main office" of the company. While there was, perhaps, no out-and-out refusal in terms to permit the relator to examine the stock-book, he was never accorded that privilege, always being met by evasive statements, generally to the effect that the book sought was not in the office of the transfer agent but was at the home office in Montreal.

As to the question of law, I am of the opinion that the mandate of the statute applies to the respondent company. I am prepared to hold that though it has merely a transfer agency in this jurisdiction, it is, nevertheless, within the meaning and intent of the statute, a foreign corporation having an office for the transaction of business in this State. Any other construction would defeat the remedial purpose of the statute. While, of course, we cannot inject into it a term or condition not inserted or not properly or reasonably to be inferred from expressed enactment, we should, bearing the purpose of the law in mind, avoid all forced and refined construction. Section 53 was designed for the protection of the stockholder. The book showing stock transactions, holdings and transfers was literally to be an open book to him. Domestic corporations, completely under the control of State authority, are required to keep such a book; foreign corporations, subject to our control only in so far as they enter our jurisdiction, are under the same requirement to the extent that we can impose it. Obviously where a foreign corporation has neither office nor agent within our borders, we cannot compel it to do anything as a condition of the permission and privilege extended to it. But where it has an office or a transfer agent we are in a position to extend protection to its domestic stockholders.

I do not deem it necessary to refine construction in order to hold the respondents within the statute. It is urged that the word "such" in the sentence beginning "if any such foreign stock corporation has in this State a transfer agent" refers not to a foreign stock corporation having an office for the transaction of business in this State, but only to a foreign stock corporation other than a moneyed or railroad corporation. I accept the respondents' contention that it refers to a corporation having

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an office for the transaction of business. What is the meaning of "transaction of business?" It is not necessarily synonymous with the term "doing business," as used elsewhere in this and similar acts. It does not necessarily mean that the main business of the corporation must be carried on in this State or something in the nature of that business or that capital must be employed in this State. All that the statute requires is that something related to the business of the corporation, or part of it, be carried on in the office here. The transfer of stock is such a transaction of business. It is an essential part of the proper administration of corporate affairs. By the very terms of the certificate the stock must be transferred on the books of the company, and it is made transferable only in person or by attorney upon a surrender of the certificate. A place is designated in this State where the certificates may be surrendered and the transfer made. That place is a place for the transaction of the business of the corporation, that of transferring its shares of stock. The office of the transfer agent, so far as he transacts the business of the principal, is to that extent the office of the principal. The office of Monroe & Monroe in this case becomes the office of the respondent company for the transaction of business.

I am not in accord with the contention of the respondents that the present section (53) has limited the scope of the one existing prior to the act of 1897. Section 53 of the Laws of 1892, chapter 688, provided: "The transfer agent in this state of any foreign corporation whether such agent shall be a corporation or a natural person, shall, at all times during the usual hours of transacting business, exhibit to any stockholder of such corporation, when required by him, the transfer book, and a list of the stockholders thereof, if in his power to do so, and for every violation of the provisions of this section, such agent, or any officer or clerk of such agent, shall forfeit the sum of two hundred and fifty dollars, to be recovered by the person to whom such refusal was made."

If anything the present law is broader. Formerly, though the foreign corporation had, independently of its transfer agency, an office for the transaction of other business, the requirement to keep and exhibit the stock-book was not imposed on the corporation itself but only on the transfer agent.

Now, whether the corporation has a transfer agent or not, it

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is required in all cases where it has an office for the transaction of business in this State, to keep and exhibit its stock-book. Where it also has a transfer agent it may, in the alternative, permit the inspection there; but the mandatory provision of the statute as expressed in the word "shall" is directed primarily against the corporation itself where formerly it applied to the transfer agent merely.

While the precise question involved on this application has no direct authority for it, the case of Cox v. Island Mining Co., 65 App. Div. 508, disposes of many of the points here involved and contains a dictum directly in support of the conclusion here expressed. There Justice Woodward, writing for a unanimous court, said: "The complaint, in addition to alleging that the corporation has an office at 45 Broadway, alleges that it acts as its own transfer agent, and it seems entirely reasonable that the plaintiff, by merely relying upon the presence of the corporation's transfer agent in this State, might have been entitled to recover."

In that case it is also stated by way of *obiter* that the having an office in this State for the transaction of business is not necessarily a jurisdictional fact (at page 512) which must exist as a condition of compelling deposit of the stock-book. In this memorandum, however, I have preferred to treat the having of such office as jurisdictional, with the result that I have reached the same conclusion intimated in the dictum of the Cox case.

The motion should be granted, with ten dollars costs.

Motion granted, with ten dollars costs.

THE PEOPLE ex rel. THE TRUSTEES OF AMITY BAPTIST CHURCH, a Religious Corporation, Relator, *v.* ROBERT GRIER MONROE, Commissioner of Water Supply, Gas, and Electricity of the City of New York, Respondent.

(Supreme Court, New York Special Term, March, 1903.)

New York city — Exemption of a social settlement from water assessments refused — L. 1902, ch. 605, § 2.

A building in the city of New York, adjoining, owned and used by a church, in part for its own purposes and in part for those of a social settlement there conducted by its officers, is not entitled to

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exemption from water assessments under L. 1902, ch. 605, § 2, as the statute grants exemption to a social settlement as an independent entity only, while the double uses to which the building is put make it impossible to distinguish those of the settlement from those of the church.

APPLICATION for a peremptory writ of mandamus.

Mornay Williams, for relator.

George L. Rives, Corporation Counsel (A. T. Campbell, Jr., of counsel), for respondent.

Benjamin Tuska, intervening as *amicus curiæ*.

LEVENTRITT, J. This is an application for a peremptory writ of mandamus to compel the respondent as commissioner of water supply, gas and electricity to cancel all charges for water rates appearing of record against the relator on premises 312 West Fifty-fourth street, borough of Manhattan, city of New York, and that he register this property as exempted from water rates so long as the same is used for the purpose of a social settlement.

The exemption is invoked under chapter 605 of the Laws of 1902, amending chapter 696 of the Laws of 1887, which was an act to provide hospitals, orphan asylums and other charitable institutions with water, and remitting assessments therefor. Section 1 of the act of 1902 extends the exemption to "any social settlement, whether incorporated or unincorporated, which shall own or lease for a term not less than three years, a building or buildings devoted exclusively to the purposes of such social settlement, now existing or hereafter established in the city of New York."

Were a precise definition of the term "social settlement," necessary for the purpose of this motion, the court might find itself at a loss to make it. It is a term that has not yet found its way into the dictionaries, nor do the legislative records and debates furnish a guide to the meaning intended. A general conception, which probably most of us have, would hardly be sufficient for the purposes of applying necessarily strict rules to the construction of a statutory exemption. Accepting the word "settlement" as

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used in the sense of an abiding place or residence of a group of persons, and taking the word "social" in the sense in which it is used in "social science," which is defined in the Century Dictionary as concerning itself with questions relating to public health, education, labor, punishment of crime, reformation of criminals, pauperism and the like, we might reach the definition urged by the relator, to wit, that a "social settlement is the settled place of abode or residence of a group of persons concerning themselves with the social condition or well-being of the inhabitants of the district where they live as regards health, education, labor, pauperism, crime and reformation of criminals, and the like." This, however, is hardly sufficiently precise. The court should have the guidance of experts — those engaged in the settlement work — in order properly to limit or extend the term. The only testimony on this point before the court is that given by one of the workers who was examined on the hearing to determine whether the exemption should be allowed, and who defined the phrase as "a residence of persons engaged in social and neighborhood work. By social work I mean work for the betterment of a district or neighborhood other than religious." This definition altogether lacks precision; under it could be included many charities which, from the context of the act granting exemption, are obviously not included in the phrase. The court should have the assistance of the testimony of persons familiar with institutions popularly known as social settlements, whose connection with such institutions and whose ability to describe their objects, scope and work, would qualify them to give an expert opinion.

I find, however, that it is unnecessary for the purpose of this motion to lay down or accept any very precise definition, as I am of the opinion that the relator does not otherwise bring itself within the provisions of the statute.

The relator is a religious corporation, occupying as its church building No. 310 West Fifty-fourth street in the borough of Manhattan. Exemption is sought for the adjoining property, No. 312 West Fifty-fourth street, which is owned by the relator and used by it as a settlement-house, although the treasurer of the relator, who is likewise superintendent of the settlement, also called it a church house. The settlement has, according to the testimony of the pastor of the relator, who is likewise head of the settlement, no

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organization separate from that of the church, it has no articles of association, and gets the use of the building from the church.

The building occupied as the settlement-house consists of four stories. The first floor is used for a kindergarten and a medical dispensary; the second floor for evening classes, Bible classes and public school lectures. On Sundays, however, this floor is utilized by the relator for church purposes, that of conducting its Sunday school classes. The third and fourth floors are devoted to residence purposes, the pastor and treasurer of the relator with their respective families, and deaconesses and nurses connected with the applicant living there. It is impossible on the papers before me, especially so far as the pastor and treasurer of the church and their families are concerned, to say whether the occupancy is solely by virtue of connection with the church or with settlement work. The probability is that it cannot be ascribed solely to either relationship but partly to each.

It needs no argument to show that the relator, the church, is not itself a social settlement, however broadly or narrowly we may define that term. It makes the application for exemption on behalf of a social settlement conducted by it. The statute, however, as I read it, extends the exemption to a social settlement existing as a separate and independent entity. It may be a voluntary association or it may be incorporated, but that it must have individual being is apparent from the language of section 1, which provides that it "shall own or lease for a term not less than three years a building or buildings devoted exclusively to the purposes of such settlement."

It is urged in the brief submitted by the *amicus curiæ* that the court should differentiate between the trustees of the relator as a religious society and the same trustees as a philanthropic body carrying on the settlement work. This might be done were the settlement society incorporated, or even in a state of voluntary association, if the enterprise carried on were entirely divorced from the church affairs of the relator. But I find it quite impossible to eliminate this question of substantial identity. This is all the more difficult owing to the double uses to which the settlement property is put, uses which in themselves bar the relief as they negative that exclusive use required by the statute. The conduct of the Sunday school, the use of portions of the building for residence purposes by church officials as such, and by the

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deaconesses for work unconnected with settlement objects are not such minor or negligible factors that they may be disregarded under the strict construction which must be applied to cases of exemption.

Although the work conducted on the premises is in the nature of settlement work, it is, in another aspect, distinctly a branch of the church charity, and as such would seem to fall within the principle of the decision in Roman Catholic Church of St. James v. Dalton, N. Y. L. J., March 28, 1899; affd., 44 App. Div. 642, where an exemption for water rates was sought on somewhat similar grounds.

In any aspect of the case I am of the opinion that the motion should be denied. No costs.

Motion denied, no costs.

E. MORGAN GRIFFEN, as Trustee, Etc., Plaintiff, *v.* MARY B. TRAIN, Defendant.

(Supreme Court, New York Trial Term, March, 1903.)

Evidence — Presumption that a check was given to pay a debt — Rebuttal — Entries against interest — When declarations of a person since deceased may be contradicted — Trustee.

The legal presumption arising from the giving, on Jan. 15, 1898, by a trustee, since deceased, named Frederick C. Train, to his wife, Mary B. Train, of a check for $2,500 to her order on the funds of the estate is that he gave her the check to pay a debt of that amount, but a successor trustee may rebut the presumption where he sues her for the amount of the check as representing a loan to her from the estate.

Memoranda in the handwriting of Frederick, found among the papers of the estate consisting of, what proves to be, a list of its assets, showing an entry "M. B. T. June 15th, 1898 2500" and also consisting of, what appears to be, a list of debts, due the estate, containing the same entry, are admissible on the part of the plaintiff as admissions of Frederick against his own interest and rebut presumptively the presumption that the check paid a debt.

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Where, however, the plaintiff introduces these admissions or declarations of the deceased Frederick, the defendant is entitled to contradict them, and where, as is stipulated, she is willing to testify that, after receiving and indorsing the check in blank, she at once handed it back to Frederick and never had any of the moneys it represented, the plaintiff cannot recover of her as for a loan or at all.

ACTION for the recovery of a sum of money.

Charles H. Payne, for plaintiff.

Daly, Hoyt & Mason (Charles K. Carpenter, of counsel), for defendant.

SCOTT, J. This action is submitted upon an agreed statement of facts, and upon certain proofs offered by each party, as to which the other party waives actual evidence, but objects for irrelevancy and incompetency. The action is for the recovery of the sum of $2,500 with interest from June 5, 1898. The following are the admitted facts: that on June 15, 1898, Frederick C. Train was the duly constituted and acting trustee under a deed of trust from Virginia W. Blanchard, and as such trustee was seized and possessed of a large amount of real and personal property belonging to said trust estate; that the defendant was the wife of said Frederick C. Train; that on June 15, 1898, the said Frederick C. Train, as such trustee, drew his check upon the Mercantile National Bank of the city of New York to the order of the defendant Mary B. Train for $2,500 against the funds of the trust estate deposited in said bank; that the defendant thereupon indorsed said check in blank; that said check was afterwards indorsed by said Frederick C. Train in his individual name and was collected by him from the bank on which it was drawn through the banking-house of Charles Frazier & Co., where said Frederick C. Train kept his personal account, and the proceeds credited to his said personal account; that said Frederick C. Train died on March 3, 1902, being then trustee of said trust for Virginia W. Blanchard, and thereafter on March 25, 1902, the plaintiff E. Morgan Griffen was duly appointed trustee of said trust in the place and stead of said Frederick C. Train and thereupon became seized and possessed, as such trustee, of all

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the property of such trust estate, including the claim of such trust estate against the defendant for money loaned to her in the transaction aforesaid, if there be any valid claim therefor; that the said Frederick C. Train, while trustee of said trust, kept no regular books of account as trustee other than a check-book, but that he was accustomed to keep among his papers memoranda containing more or less full statements in respect to the property of the trust estate; that no part of said sum of $2,500, or any interest thereon, has been paid to the trust estate by the defendant, or other side. Upon the foregoing facts I can find no evidence to justify the plaintiff's claim that the transaction above recited proved a loan to the defendant from the estate. All that appears is that on a given date a check upon the funds of the estate was given to defendant. The legal presumption arising from such a transaction, unless otherwise explained, is that the check was given in payment of a debt. Nay v. Curley, 113 N. Y. 575. This presumption of course is open to rebuttal. For this purpose the plaintiff offers in evidence two memoranda found, immediately after the death of Frederick C. Train, among the papers of the trust estate in his desk, both memoranda being in his own handwriting. It is conceded that these memoranda were made without the knowledge and not in the presence of the defendant. The first memorandum contains a list of names or initials opposite to each of which is a sum of money, and opposite to some of which are dates. The second memorandum is attached to a promissory note filled out in Frederick C. Train's own handwriting on a printed blank, dated February 1, 1894, whereby said Train promises to pay on demand, to the order of himself as trustee, the sum of $2,500. This second memorandum contains a list of initials, dates and amounts. Upon the first list appear the words and figures "M. B. T. June 15th, 1898 2500" and on the second list appear the same initials, date and amount. The plaintiff offers to show that all the items on the first memorandum, except the item above quoted, and one other have been, by the plaintiff and his attorney, clearly identified with various items of real and personal property belonging to the trust estate and that the said memorandum contains a practically complete list, in abbreviated form, of all the property of the trust estate which belonged to such estate in the month of December, 1901. He also offers to prove in particular that the item "I. A. T. July

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17th 1900" has been found to represent an indebtedness to the trust estate on the part of Frederick C. Train's brother Isaac A. Train which has since been paid to plaintiff by said Isaac A. Train, and that the item "W. D. B. Blake Trust" has been found to represent an indebtedness of one W. D. Barnes to the trust estate secured by an assignment of an interest in a trust created by one Sarah F. Blake, a settlement of which indebtedness is now pending with said W. D. Barnes, he admitting himself to be indebted to the plaintiff as trustee. In my opinion these memoranda, with the evidence relating to them, are admissible. The first memorandum as to all at least except the unidentified items are entries against the interest of the deceased trustee because they contain statements of the various items of property with which he was chargeable. It was clearly to his interest, in making out a list of the trust property, to include in it nothing except what he was properly accountable for, and hence there was an extreme improbability that he would include any items except such as went to make up the trust estate. He thereby charged himself with the various items contained in the memorandum. Being admissible upon this ground the entries are not only evidence of the fact against his interest, but also of the other incidental and collateral facts and circumstances mentioned in the memorandum and are admissible in evidence irrespective of the fact whether any privity existed between the person who made them and the party against whom they are offered. Livingston v. Arnoux, 56 N. Y. 507–519. The memoranda therefore are admissible against the defendant, if she be identified with the initials "M. B. T." included therein, and a presumption arises that she is indebted to the trust estate if the list in which her initials appear is identified as a list of creditors of the estate. As has been said the proof offered by the plaintiff tends to show that the first memorandum contains a list of the assets of the estate, and it is perfectly natural and proper that a list of the assets should include a list of those to whom the estate's money had been loaned, and who therefore are debtors of the estate. Every item, except two, in the first memorandum has been identified with various items of personal and real property belonging to the estate. It is most improbable that out of a long list of items such as is contained in the first memorandum all but two should represent assets of the estate and these two should represent

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something else. On the contrary every presumption is that those two unidentified items partake of the same general character as the other items, and also represent assets. Among these items appears that one reading "M. B. T. June 15th, 1898 2500." The check upon which this action is founded was for $2,500, was dated June 15, 1898, and was drawn to the order of defendant whose initials are M. B. T. It requires no strain upon the imagination to presume that this entry referred to the check. Found where it is the item indicates also that the amount represented by it constitutes a portion of the assets of the estate as they were in December, 1901. If this item related to the check given to the defendant, and also represented a portion of the assets of the estate the further presumption arises that the amount was given to defendant as a loan. This presumption is strengthened by the second memorandum which as is claimed contains a list of the debts due to the estate. The first item reads "F. C. T. (being the initials of the deceased trustee) Feb. 1, 1894. 2500." This corresponds in date and amount with the promissory note, signed by the deceased trustee, and attached to the memorandum, and the initials are his. There follows a number of sums under the same initials, but of different dates. The aggregate of all these sums under his initials, including the first item of $2,500, is $10,276.13. In the first memorandum in what is assumed to be a list of assets of the estate is the entry "F. C. T. 10,276.13." It is not difficult to infer that this item in the first memorandum, and the several items under the same initials in the second memorandum indicate an indebtedness on the part of the deceased trustee to the estate of the sum of $10,276.13. In both the first and second memoranda are found the identical items reading "I. A. T. July 17th, 1900. 289.17." It has been ascertained that this item represents an indebtedness to the trust estate on the part of Isaac A. Train, who has acknowledged the debt by paying the indebtedness. It is no violent presumption to assume that the second memorandum was intended to represent the debts due to the estate. Among these items appears the same item as is included in the first memorandum reading "M. B. T. June 15th, 1898 2500." Accepting these memoranda as competent evidence of the statements they contain, and interpreting them by the ascertained facts and the apparent coincidences there is found a presumption that the check for $2,500 given to defendant on

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June 15, 1898 represented a loan to her out of the funds of the estate, and this presumption is quite sufficient to meet and overcome the slight presumption, arising from the mere fact that she received the check, that it was paid to her in satisfaction of an antecedent debt. While the entries made by the deceased trustee are competent as against the defendant for the reason above stated, the evidence is not conclusive against her and the presumption arising therefrom may be rebutted by any competent evidence. For this purpose the defendant offers her own testimony as to which the plaintiff admits that if called she would so testify, and that her testimony can neither be contradicted nor impeached, and he waives the actual taking of the testimony. He insists, however, that it relates to a personal transaction between herself and the deceased trustee, predecessor in title of the plaintiff, and therefore, being offered in her own behalf, is incompetent under section 829 of the Code of Civil Procedure. It would be clearly incompetent unless the plaintiff has opened the door by the introduction of the memoranda above discussed. It was said by the Court of Appeals in Potts v. Mayer, 86 N. Y. 305, that "the obvious intention of the statute is to preserve equality and prevent unfair advantage," and that "to allow the dead man to speak through his declarations while living, and deny the right of contradiction or correction to the surviving party, would shift the unfair advantage to those representing the deceased party, and it was to obviate such injustice that the exception in the statute was framed." This quotation precisely fits the case presented here. The memoranda are received in evidence, not because they have any probative value of their own, but because they represent declarations of the deceased trustee, made under circumstances which are deemed to raise a presumption that they truthfully state the facts. But at best they are only evidence of his declarations. They stand upon the same footing as any other proof of his declarations. When the plaintiff is permitted to read them in evidence he is permitted to present the testimony of the deceased person concerning the transaction. To this effect is Marsh v. Brown, 18 Hun, 319, where the precise question arose. The evidence which the defendant offers, and which must be admitted, if the memoranda of the deceased trustee are received, is to this effect: that she indorsed the check at the request of her husband, the deceased

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trustee, and immediately upon so indorsing it, handed the same back to him; that she never at any time exercised dominion over, or ownership of the said check or its proceeds, and never performed any act in regard thereto except the indorsement of said check drawn in her favor; that she had no knowledge of the disposition of said check or its proceeds; that she never borrowed or received any money from the said trust estate, unless the indorsement of said check constitutes and imports, in law, a loan to her. This evidence completely negatives any presumption that any loan was made to the defendant out of the funds of the estate. A loan is made when the borrower receives money, over which she exercises dominion and ownership, and which she, expressly or impliedly, promises to return. A check is not money, but is only a token representing money, and where, as in the present case, a party receives a check representing a sum of money, and immediately returns it to the person from whom she received it, either the transaction does not represent a loan at all, or it represents a momentary loan which is immediately repaid. The defendant received a check from the trustee, and immediately returned it to the same trustee. It was no concern of hers whether he returned the money to the trust fund, or used it himself. In either case he was still a trustee, and received back the check in that capacity. If he afterwards misappropriated it the defendant had not aided him. The fact that she indorsed the check before handing it back does not affect the question. Since the check was drawn to her order her indorsement was necessary whether the check was to be redeposited in the trust account or not. The circumstances as explained by the defendant show that the transaction contained none of the essential elements of a loan to her. American Preservers Co. v. Wiltsie, 10 Misc. Rep. 463.

The complaint must be dismissed, and since both parties deem the case a proper one for an allowance the defendant may have an extra allowance of $125.

Complaint dismissed.

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THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, v. JOHN J. SCANNELL and WILLIAM L. MARKS, Defendants.

SAME, Plaintiff, v. JOHN J. SCANNELL, Defendant.

(Supreme Court, New York Trial Term, March, 1903.)

Crimes — Indictment of the head of a New York city department for letting a contract over $1,000 to a bidder not the lowest — Statutory construction — L. 1892, ch. 677, § 31; 1897, ch. 378, § 419; 1901, ch. 466, § 419.

An indictment found under the charter of the city of New York (L. 1897, ch. 378, § 419) of the head of a city department for letting a contract over $1,000 to a bidder other than the lowest, in a case where the head of the department has not rejected all bids and the board of public improvements has not determined that it is in the public interest to accept a bid other than the lowest, would, under the rule that unless a contrary intent appears the striking from a statute of a provision essential to support an indictment under it makes it inoperative as to offenses committed before the later act, ordinarily be nullified by the repeal by the amended charter (L. 1901, ch. 466, § 419) of the words "board of public improvements" and the substitution therefor of the words "board of estimate and apportionment", and this because there is not now in existence any board of public improvements whose prior consent to such a letting is now required.

The indictment is, however, saved by the declaration of the Statutory Construction Act (L. 1892, ch. 677, § 31) that all criminal proceedings, commenced under a statute repealed and pending immediately prior to the repeal, may be prosecuted to final effect in the same manner as they might if such provisions were not repealed.

Section 31 of the Statutory Construction Act is applicable to all legislation passed after it.

There is nothing in the amended charter of 1901 to show a legislative intent that said section 31 should not apply to section 419 of the charter of 1897.

The amended charter, in substance, expressly declares that the new section 419, substantially the same as the old one, is to be deemed a continuation of the old one.

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The charter makes the price the test of bids, and therefore the court cannot consider the question whether the higher bid the fire commissioner unlawfully accepted may not prove the lowest because of the better quality of the article furnished thereby.

It cannot be held that there was no lowest bidder merely because each of two bidders bid the lowest price offered.

DEMURRERS to indictment.

William Travers Jerome, District Attorney, for People.

Nicoll, Anable & Lindsay, for defendants.

SCOTT, J. The defendants Scannell and Marks are jointly indicted for a criminal conspiracy, and the defendant Scannell is separately indicted for criminal neglect of duty. Both indictments are based upon alleged violations by Scannell, while fire commissioner, of section 419 of the first Greater New York charter (Laws of 1897, chap. 378), which prescribed the method to be adopted by heads of departments in letting contracts for public supplies. That section required that all contracts involving an expenditure of over $1,000 should be founded on sealed bids or proposals made in compliance with public notices, duly advertised. It was then made the duty of the head of a department, unless he should deem it to the interest of the city to reject all bids, to "award the contract to the lowest bidder, unless the board of public improvements, by a vote of a majority of its members, of whom the mayor and comptroller shall be two, shall determine that a bid other than the lowest shall be accepted." The offense charged is that divers contracts were let to another bidder than the lowest, without the requisite authority from the board of public improvements. The section quoted contained other regulations respecting the letting of public contracts, providing among other things that all contracts should be made under regulations to be adopted by the municipal council. In 1901 the Legislature passed an act (chap. 466) amending the charter of 1897, and in effect creating a complete new charter. By this act section 419 of the former charter was re-enacted in identical words, except that the "board of aldermen" was substituted for

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the "municipal council" wherever the latter words appeared, and "board of estimate and apportionment" was substituted for the "board of public improvements" in the clause providing for consent to the letting of a contract to other than the lowest bidder. The defendants urge that this amendment of the section has repealed the provision which the defendant Scannell is charged with violating, citing the familiar rule that a statute re-enacting a former statute and providing that certain sections thereof shall be amended "so as to read as follows" repeals, by implication, everything contained in the sections of the original act not re-enacted. The contention is that so much of the original section 419 as forbade the letting of a contract to other than the lowest bidder, without the consent of the "board of public improvements" has thus been repealed. Upon this contention follows the second that this clause of the section, which is the one which the defendants Scannell and Marks are charged with having conspired to violate, and Scannell is charged with having actually violated, having been repealed there is now no support in law for these indictments. This contention rests upon the well-established rule of the criminal law that whenever a statute creating a criminal offense is expressly repealed, or that portion of it which is essential to sustain an indictment drawn under its provisions is stricken out by a law subsequently enacted, the former, unless a contrary intent upon the part of the lawmakers appears, will be held inoperative even as to offenses committed before the passage of the later act. That the particular provision which the defendant Scannell is charged with having violated has been repealed cannot, I think, be doubted. It would not now charge a violation of law to say, of a head of a department, that he had let a contract to other than the lowest bidder without the previous consent of the board of public improvements, because that body no longer exists and its consent is no longer required. It is true that a similar consent is, in like cases, required of the board of estimate and apportionment, but Scannell is not charged with having let a contract without the consent of that board. Unless therefore the Legislature has in some way indicated its intention that the repeal of this provision shall not have the effect, which it would have had at common law, of ending all prosecutions for violation of the repealed provision, these indictments must fall. The amended charter of 1901 does

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not contain any saving clause, applicable to section 419 of the former charter, which in terms preserves and keeps alive prosecutions for violations committed prior to the passage of the amendatory act. There is contained in the second section of the act such a saving clause, which is made applicable only to the sections expressly repealed and which are enumerated in a schedule attached to the act and denominated The First Schedule. Section 419 is not included in this schedule. The Statutory Construction Act (L. 1892, ch. 677), however, contains in its thirty-first section a general saving clause applicable to all actions or proceedings, civil or criminal, commenced under or by virtue of a repealed statute, and pending immediately prior to such repeal. It has been distinctly held that this section applies to all future legislation enacted after its adoption. People ex rel. City of Buffalo v. N. Y. C. & H. R. R. R. Co., 156 N. Y. 570. Its terms are sufficiently broad to save the present prosecution unless there is to be found in the amended charter of 1901 some expression or omission which serves to indicate a legislative intent that it shall not apply to section 419 of the former charter. It is not contended that there is any expression indicating such intent, but it is urged that inasmuch as the Legislature incorporated into the charter a special saving clause which it specifically made applicable to certain sections and not to others, it must be deemed to have intended that saving clause to be the only one applicable to that particular act, and hence that it intended that no saving clause at all should apply to the sections of the former charter which were amended, but were not included in the first schedule. The broad and general language of section 31 of the Statutory Construction Act, which, as it has been held, was intended to apply to all future legislation, indicates an intention on the part of the Legislature to reverse the common-law rule as to the effect of a repealing statute upon prosecutions commenced before the repeal under the provisions of the repealed statute. Doubtless it is within the power of the Legislature to again restore the former rule either as to all repealing statutes, or as to any particular statute. It will not, however, be deemed to have done so by mere implication, unless the intent is made very clearly to appear. I find no evidence of such an intention in the charter of 1901. There were many sections in that charter, and section 419 was one of them, which were re-enacted in

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the precise form, or substantially in the same form, as the corresponding sections of the charter of 1897, except for the changes made necessary by the abolition of certain boards and officers, and the devolution of their duties upon others. As to these sections it was provided (§ 2) that, so far as they are substantially the same as those of laws existing on December 31, 1901 (which includes section 419 of the earlier charter), they shall be construed as a continuation of said laws, modified or amended according to the language employed in the new act, and not as new enactments. This is a clear expression of the legislative will that sections, like 419 of the earlier charter, although to some extent modified by the new charter, should not be deemed to be repealed thereby, but on the contrary to have remained continuously in force. It is impossible to find in such language even an implied intention that, as to such sections, the general saving clause of the Statutory Construction Act should become inoperative, and that the old rule upon which the defendants rely should be restored. My conclusion is that this objection to the further prosecution of the indictments cannot prevail.

Various objections are urged to the indictments against the defendant Scannell based upon a supposed failure to allege all the facts necessary to show that the defendants have committed any offense. They rest for the most part upon a misapprehension as to the real gravamen of the charge against the defendants. One of the indictments (and the other is similar save as to name and quantities) charges that the defendant called for and received various sealed bids and proposals for 15,000 feet of fire hose; that the Manhattan Rubber Manufacturing Company and the Mineralized Rubber Company each offered to provide the hose for eighty-five cents per foot, which two corporations by the said bids then and there were and became the lowest bidders for said contract; that it thereupon became the duty of the defendant, as fire commissioner, if he should not deem it for the interest of the city to reject all bids to award the contract to the said Manhattan Rubber Manufacturing Company and Mineralized Rubber Company or to one of them, unless the board of public improvements should determine it to be for the public interest that a bid other than those should be accepted. Then follows the charge against the defendant that he did wholly neglect and omit to perform the duty so enjoined by law upon him as aforesaid, and did will-

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fully and unlawfully neglect and omit to award said contract to the said Manhattan Rubber Manufacturing Company or Mineralized Rubber Company or either of them, but on the contrary, and here comes the real offense, did then and there award the said contract to a certain corporation called the Akron Rubber Company, which said corporation was not the lowest bidder therefor, but which corporation, on the contrary, in its bid therefor had offered to provide the said hose for one dollar for each foot thereof, the board of public improvements not having determined that it was for the public interest that the said bid of the said Akron Rubber Company, or any other bid than those of the Manhattan Rubber Manufacturing Company and Mineralized Rubber Company should be accepted. The offense charged here is the award of the contract to one, not the lowest bidder, without previous consent by the board of public improvements. It is not that he failed to award the contracts to the other companies named, for he might have lawfully rejected all bids. The charge is that he first determined not to reject all bids; that his duty then was to award the contract to the lowest bidder, and that he committed an offense by making the award to a bidder who was not the lowest. I find no essential allegation of fact lacking in the indictments. It is urged that, for aught that is alleged in the indictments, the Akron Company's bid, although the highest in price, might in fact be the lowest by reason of the superior quality of the article that company proposed to furnish. It may often be true that it will be found economical to purchase a better article at a higher price, than a poorer article at a low price. The only test of bids made under the charter is, however, that of price. It is the duty of a commissioner inviting bids for supplies, to clearly indicate by standard, description, test or sample the kind and quality of goods which he requires. Every bidder will be presumed to offer goods of the kind and quality thus indicated, and thus the price at which each offers to supply such goods affords the only standard by which the bids can be compared in order to ascertain which is the lowest. It is not to be anticipated that any bidder will furnish goods of a better kind or quality than are called for, and it will be the duty of the commissioner to see to it that a poorer kind or quality is not accepted. The rule for testing bids suggested by the defendant would open a wide door to evasions of the restrictive provisions

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of the charter. It is further suggested that inasmuch as it appears that there were two bidders who offered to supply the hose at the identical price, that being lower than that of any other bidder, it cannot be said that there was any lowest bidder, and hence that the contingency contemplated by the statute had not arisen, and therefore that there was no statute applicable to the situation and which forbade the awarding of the contract to any bidder, even the highest. I cannot accept this contention as being made seriously, or as meriting discussion. A further objection is made to the conspiracy indictment that it is multifarious. If the question thus suggested was a new one its discussion would be interesting. I do not, however, deem it open for discussion. Similar indictments, as to which the same defect was charged, have repeatedly been upheld. People v. Willis, 158 N. Y. 392; People v. Klipfel, 160 id. 371; People v. Herlihy, 66 App. Div. 534, aff'd. on opinion below, 170 N. Y. 584.

The demurrers must be overruled.

Demurrers overruled.

M. GROH'S SONS, Plaintiff, *v.* HENRY FELDMAN et al., Defendants.

(Supreme Court, New York Trial Term, March, 1903.)

Payment — By creditor taking, after default on a chattel mortgage, and retaining the chattels.

Where, after a vendee has given his vendor a promissory note for goods sold as well as a collateral chattel mortgage upon them, the vendor takes them, after default and under the mortgage, and instead of selling retains them, there is a payment of the debt to the extent of their true value, and if that exceeds the face of the note it is not enforcible.

MOTION for a judgment on the pleadings.

Gratz Nathan, for plaintiff.

Engel, Engel & Oppenheimer, for defendants.

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SCOTT, J. Both parties move for a judgment on the pleadings. The action is upon a promissory note payable on demand. The defendants show by way of defense that the plaintiff sold to them certain chattels and fixtures at an agreed price, whereupon the defendants gave to plaintiff the promissory note in suit, and executed a chattel mortgage covering the fixtures sold, as security for the payment of the note. That afterwards the plaintiff took possession of and carried away the chattels and kept and retained the same for its own use and in full satisfaction and discharge of the obligation set forth in said promissory note and mortgage. It is further alleged that at the time of taking, the chattels taken were worth the full sum of the indebtedness. The defendants also interpose a counterclaim, upon the same state of facts for the alleged value of the chattels. It is obvious that the counterclaim cannot succeed, for the plaintiff had the right under the mortgage to take possession of the chattels, and all that remains to defendants is the right to redeem by paying the debt. A more serious question is presented by defendants' motion to dismiss the complaint, and plaintiff's counter-motion for judgment notwithstanding the answer. This is in effect a demurrer to the answer that it does not state facts constituting a defense. The plaintiff, in its reply, has contented itself with answering the counterclaim. The defendants insist that by taking and retaining the chattels without any sale, the plaintiff has satisfied the debt. The rule is not so broad. In Case v. Boughton, 11 Wend. 106, it was held that when a mortgagee takes possession of a mortgage chattel, after failure to perform the condition of the mortgage, the debt is thereby satisfied, providing the chattel be of sufficient value for the purpose. To the same effect is Stoddard v. Denison, 38 How. Pr. 303. It was said by the General Term in Third National Bank v. Shields, 55 Hun, 274, that the presumption of payment, at least to the true value of the mortgaged property taken possession of by the mortgagee after default, attaches when the mortgagee refuses to sell the property. It is true that where the failure to promptly sell is due to some cause beyond the control of the mortgagee, as where a third party claims ownership of the mortgaged chattels, the mortgagee is not called upon to postpone the collection of his debt by action, until the controversy as to the ownership is settled. But no such circumstance appears in this case. Nor does

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it appear that the defendants had abandoned the chattels as was made to appear in Lathers v. Hunt, 9 N. Y. Supp. 494, and Beadleston & Woerz v. Morton, 16 Misc. Rep. 72. I find nothing in the later authorities to qualify the rule laid down in Case v. Boughton, *supra*, unless where particular circumstances appear excusing a delay in selling, or where it is apparent that the only reason for taking possession of the chattels was to prevent loss of the security. It is true that the plaintiff in its reply undertakes to assert that the chattels were taken under the so-called "danger clause" of the mortgage, but in the same breath it also asserts that the mortgage debt was overdue. In any event the reply is, by its own terms, made applicable only to the counterclaim, and not to the defenses. I feel constrained to hold that the taking and retaining possession of the mortgaged chattels, after default, was a payment of the debt to the extent of the value of the chattels taken. This value is alleged by defendants to be equal to the full amount of the indebtedness, and for the purposes of this motion that allegation must be taken as true.

For the purposes of the determination of the rights of the parties, the plaintiff is deemed to have denied the allegations of the answer to which it was not required to reply. Code Civ. Pro., § 522. It must therefore be deemed to have denied the allegation that the chattels taken and retained are worth the full amount of the debt. I do not understand that by moving for judgment on the pleadings the plaintiff waived the right to controvert the allegations of the answer. It may still show either that it did not take and retain the chattels, or that they were worth less than the amount of the note. For this purpose the action will be restored to the day calendar for Monday, March 16, 1903.

Ordered accordingly.

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SIMON HIRSHBACH, Plaintiff, *v.* ALEXANDER P. KETCHUM, Defendant.

(Supreme Court, New York Trial Term, March, 1903.)

Res adjudicata — Judgment on the merits on demurrer — Subsequent reversal by the Court of Appeals of the doctrine held below.

A judgment of the Supreme Court dismissing, on the merits and after a demurrer, a complaint on a contract upon the ground that the contract was illegal, the issue of validity having been directly involved, is *res adjudicata* in another action, between the same parties and upon the same contract, brought by the same plaintiff to recover a different item of damage thereunder.

Where the plaintiff has never appealed from the judgment he must be deemed to have acquiesced in it, and cannot now take advantage of the fact that six years later the Court of Appeals, in another action but upon a similar contract, decided that a contract like the plaintiff's was legal.

ACTION on contract.

Samuel H. Guggenheimer, for plaintiff.

Thompson & Maloney (William P. Maloney, of counsel), for defendant.

SCOTT, J. I find it impossible to distinguish this case from Irwin v. Curie, 171 N. Y. 409. There must therefore be judgment for the plaintiff unless the defendant succeeds upon his special defense that the matter is *res adjudicata*. The contract out of which the action arises was made between the parties in 1886, and provides that defendant shall pay plaintiff one-half of the net fees or compensation realized by defendant in prosecuting claims against the Federal Government for a rebate of duties paid by importers, whose business had been solicited and obtained by plaintiff. In 1886 the plaintiff sued defendant in this court upon the same contract, but for the moiety of other fees than those included in this action. The defendant demurred for insufficiency of the complaint and the demurrer was sustained at the Appellate Division, leave being given to amend the complaint. Hirshbach v. Ketchum, 5 App. Div. 324. The com-

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plaint having been amended was again demurred to and the demurrer sustained at Special Term, the judgment reciting that the complaint was dismissed "on the merits," and no leave being given to further amend. This judgment was not appealed from, but in December, 1902, after the decision of Irwin v. Curie, *supra*, the plaintiff moved to amend the Special Term judgment sustaining the second demurrer by striking out the words "on the merits." This motion was granted at Special Term, but the order granting it was reversed by the Appellate Division. Although the plaintiff challenges the jurisdiction and power of the Appellate Division I am not at liberty to consider that question since that branch of this court, having assumed jurisdiction in the premises, must be deemed to have decided that it had such jurisdiction. Assuming then that the judgment in the former action stands as one dismissing the complaint on the merits, the question is presented as to its efficacy as *res adjudicata*. The precise meaning to be given to the words "on the merits" in an order or judgment has never been very clearly defined. Judge Selden said that they were to be regarded as referring to the strict legal rights of the parties, as contradistinguished from mere questions of practice (St. John v. West, 4 How. Pr. 329), and this definition has frequently been cited with approval. It is, however, not of controlling importance whether or not the judgment is declared to be upon the merits. The real question is whether it was in fact an adjudication upon the merits. It is well settled that a judgment sustaining a demurrer, if it goes to the merits of the controversy, is as conclusive as an adjudication of the matter litigated as in any other judgment. Gould v. Evansville, etc., R. R. Co., 91 U. S. 533; Alley v. Nott, 111 id. 472. An examination of the judgment-roll in the former action between these same parties shows that the validity of the agreement between them was directly and necessarily an issue. There was no formal or technical defect or omission in the amended complaint, and it is obvious upon reading it that it contained every allegation necessary to establish a cause of action in the plaintiff's favor, if the agreement between himself and the defendant was lawful and valid. Hence the judgment sustaining the demurrer must have proceeded upon the ground that the contract was illegal and void, and that, undoubtedly, was the ground upon which it rested. That judgment, not having been appealed from,

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was a final and conclusive adjudication between the parties that the contract relied on in that action was void and unenforceable. The present action is founded upon the same contract. It is true that the present complaint differs somewhat in form and construction from that in the former action, but in every essential particular it is the same, and the contract relied upon is identical. The correspondence which passed between the parties in 1887 did not create or constitute a new contract and did not purport to do so. It merely expressed the understanding of the parties as to the precise terms of the contract which they had made in the previous year. Nor is it of moment that the plaintiff does not now sue for the identical moneys which he sought to recover in the former action. He seeks now to recover another instalment of fees received from the same client and under the same agreement. It is precisely like a second action for rent under a lease where the validity of the lease, the liability of the defendant and the amount of the rent had been adjudicated in a former action. In such a case no one would doubt for a moment that the judgment in the first action was conclusive in the other. Of course the fact that it now appears, by the decision of the Court of Appeals in Irwin v. Curie, *supra,* that the judgment sustaining the demurrer was erroneous does not affect the efficacy of that judgment as a bar to this action. De Puy v. Strong, 37 N. Y. 372.

In my opinion the judgment pleaded by the defendant is a bar to this action, and he is, therefore, entitled to judgment.

Judgment for defendant.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* JAMES P. Alias "WHITEY" SULLIVAN, Defendant.

(Supreme Court, Schoharie Special Term, March, 1903.)

Crimes — Motion in a capital case for a new trial for newly discovered evidence — Code Crim. Pro., § 465, subd. 7.

A motion for a new trial of a capital case for newly discovered evidence cannot be granted unless there is a reasonable presumption that the reception of the evidence upon the trial would have changed the verdict rendered.

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New proof, tending to show that an accomplice of the defendant, the principal witness for the prosecution, had sworn falsely when he testified that he had never been convicted of a felony, held insufficient for a new trial.

New evidence of two tramps and criminals, impeaching the accomplice's statement that he was with the defendant at the place of and almost up to the moment of the murder and tending to show that the defendant could not have been within forty-five miles of the place of the murder when it was committed, rejected as fabricated.

New proof by affidavit, that ten days after the murder the accomplice admitted having committed it, rejected as incredible.

MOTION for a new trial on newly-discovered evidence.

The defendant was convicted of the murder of Matthew Wilson early in the morning of Nov. 27, 1900.

S. L. & C. B. Mayham (Lewis E. Carr, of counsel), for motion.

Edward A. Dox, District Attorney (George M. Palmer, of counsel), opposed.

BETTS, J. The defendant was convicted at the Trial Term in Schoharie county of the crime of murder in the first degree. An appeal was taken therefrom and affirmed by the Court of Appeals — reported in 173 N. Y. 122 — and the date fixed for the electrocution of the defendant. Subsequently, at the instance of Rev. Father Curry, of New York city, the Governor granted a reprieve until the tenth day of March.

This proceeding came before me on an order to show cause, granted by Mr. Justice Herrick, returnable at the Columbia Special Term to show cause why a new trial should not be granted on the ground of newly-discovered evidence. The application is made under section 465 of the Code of Criminal Procedure, subdivision 7.

Section 465 is as follows: "The court in which a trial has been had upon an issue of fact has power to grant a new trial when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application, in the following cases: * * *

"7. Where it is made to appear, by affidavit, that upon another

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trial, the defendant can produce evidence such as, if before received, would probably have changed the verdict; if such evidence has been discovered since the trial, is not cumulative; and the failure to produce it on the trial was not owing to want of diligence. The court in such cases can, however, compel the personal appearance of the affiants before it for the purposes of their personal examination and cross-examination, under oath, upon the contents of the affidavits which they subscribed."

Three points are sought to be made by the defendant on which a new trial is asked for:

First. The principal witness upon the trial was one William G. Harris, alias "Sheeney" Harris, who was an accomplice with the defendant in a plot to rob a post-office at Cobleskill. Harris testified upon the trial, in substance, that he had never been arrested for or convicted of any felony. The papers submitted by the defendant on the hearing tend to show that Harris had been confined in the Erie County Penitentiary under a conviction of the crime of burglary of a post-office at Marcy or Tracy, New York, and had served a term there for that crime, and it is argued, if that fact were laid before the jury, a different result might have been reached.

Second. The application is also made upon the affidavits of one George Arden, who recites in his moving affidavit that he resides at the corner of Nassau and Adams streets, in the borough of Brooklyn, and of one Harry E. Hamlin, who recites that he resides at No. 4 Charlton street, in the borough of Manhattan. Their affidavits are, in substance, that each of them was at the saloon of one Cuddy, in the city of Albany, forty-five miles from Cobleskill, on the night of November twenty-sixth and extending into the morning of November twenty-seventh, with the defendant Sullivan for such a length of time that it would have been impossible for Sullivan to have gotten to Cobleskill and committed the crime with which he is charged. In this connection, the affidavit of one John Butler is submitted, who had been instrumental in bringing the matter of the conviction of Sullivan to the attention of Arden and Hamlin.

The defendant argues that if this testimony was submitted upon a new trial it would probably have changed the verdict of the jury.

Third. The affidavit of one James J. O'Reilly is submitted, in

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which he says, in substance, that he knows the said William G. Harris, and that, about ten days after the report of the murder of Wilson, Harris came into O'Reilly's Hotel on Morton street, in the city of Albany, and said: "I shot and killed Matthew Wilson; I had to do it to save my own life; he shot at me and I had to shoot him to save myself." That one Edward J. Murphy was in the place at the time and must have heard this statement, and the affidavit of said Edward J. Murphy is submitted in which he recites that he did hear it, and from this it is argued that a different verdict might have been rendered had this testimony been before the jury.

I shall briefly consider these different points in giving summary reasons for the action taken on this application:

First. As to the alleged fact of Harris having been confined in the Erie county penitentiary. Harris was indicted for murder in the first degree for the same crime for which Sullivan was indicted. His testimony shows that he went along with the defendant and the other four to Cobleskill, armed, with the intention of committing a burglary. He desisted, according to his own testimony, from participating in that burglary for two reasons: One was the fact that some of his pals or associates, including the defendant, had whisky with them, and were getting under its influence in such a way that Harris feared detection would result; and the other, that shortly before reaching the post-office Harris claims that he and another of the six saw two men watching them. The only reasons, therefore, assigned by Harris for not participating in this burglary are prudential reasons. No remorse nor repentance or any higher motive than personal fear. Hence the character of Harris was shown to the jury, which tried Sullivan by himself, in just as unenviable a light as it could have been had the additional fact that he had been convicted of the crime of burglary been actually shown. It was also shown that he was taken from the Schenectady county jail to Schoharie at or about the time of the trial of Sullivan, and the reason for his incarceration in the Schenectady county jail did not appear. It is evident, then, that the jury, believing or not believing the testimony of Harris, was under no delusion as to the character of the man who was there testifying.

It is a very pertinent fact also, as bearing upon this point, that Harris was not produced before the grand jury which found the

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indictment against Sullivan. Subsequently and prior to the trial a motion was granted that the district attorney furnish the minutes before the grand jury to the defendant's counsel, which was done. Upon those minutes a motion was made to dismiss the indictment which was denied. The trial judge, having all the facts before him, decided that there was sufficient evidence before the grand jury, which unexplained and uncontradicted, would warrant the conviction of Sullivan by a trial jury, and that evidence did not include any evidence of Harris. There was no explanation or contradiction given upon the trial except three witnesses produced to establish an alibi, whom the jury evidently did not believe.

Second. This motion was made before me at Hudson, March seventh. A reprieve had been then granted to Sullivan which delayed his electrocution until March tenth. Upon the very voluminous record then received application was made to the Governor for an additional respite for two weeks, which was granted, and a respite extended until March twenty-fourth. Immediately upon this action of the Executive I ordered the witnesses Arden, Hamlin and Butler to appear before me at Chambers at Kingston for an oral examination. In response to this order Hamlin and Arden appeared and were examined and cross-examined at great length. Hamlin testified, in substance, that he was a gambler and had been such from his youth, had followed the races from one city to another, and had plied his vocation of a gambler in all the principal cities of the United States; that he had no home except that he said he made his "home base" in Chicago, Ill. That he usually spent from a few weeks to a few months in one city, and then traveled to another. That at the time the statement was originally made to Father Curry he was residing at 410 West Nineteenth street, in the city of New York, with his wife. Immediately after making this affidavit, for fear of annoyance to him or his wife, which they were subjected to on account of this affidavit made in this matter, he moved to No. 4 Charlton street, New York, and stayed there eight days, when, on account of claimed annoyances by detectives and interviewers, he went out of the State to Boston, Mass., with his wife, left her there and returned to New York, and was temporarily stopping with three or four men in a room paying one dollar a week to one of these men. He did not know the names of all his

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room mates, nor did he know the location of the house nor the owner or person in charge thereof. He was interrogated at great length, and although he carefully iterated and reiterated that it was the night of November twenty-sixth and morning of November twenty-seventh when he was at this Albany saloon and saw the defendant, he was unable to give any other date at which he had been at any other place, and he was entirely unable to give any satisfactory reason for fixing this date as the twenty-sixth of November, as it was some months after this twenty-sixth of November before the matter was called to his attention.

Arden's original affidavit stated that he resided at the corner of Adams and Nassau streets, in Brooklyn. He at once, upon making his affidavit, moved from there, if he ever resided there, and now is living in a house a distance from this place, paying a small weekly compensation therefor when he has the means so to do. He testified that his business is that of a peddler, traveling from one place to another; that he has no home, no fixed place of abode, stops where the night or his business overtakes him, and often sleeps for a considerable length of time in a box car when he is unable or not desirous of procuring other lodgings. He said that he went to this saloon the night in question to see if he could not borrow some money to pay for goods that he was expecting. He became very much confused when questioned as to whom he expected to borrow this money from, or to whom it was to be paid. He testified in the first place it was to pay "Jim, the peddler," and finally that he went there to see if he could not borrow the money from "Jim, the peddler." There is nothing from his testimony by which any court or jury could gather any reason for his remembering this date.

John Butler did not appear. The reason assigned by his counsel was that he feared arrest by some criminal authority, apparently the Pinkerton detectives or United States authorities, so he was not produced. It was shown in the proceeding that he had been convicted of crime.

There is absolutely nothing in the testimony of either of these two men that would lead any court to think that a jury confronted with the testimony produced upon that trial and the testimony of these two men, would be at all likely to change its verdict. The two men are without a home, without any respectable means of livelihood, wanderers, not residents of this State, asso-

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ciates of criminals, frequenters of low resorts, and without any of the appearance of truthfulness in their narrative. They may or they may not have seen Sullivan at the saloon of Cuddy in question. There is nothing in their testimony that would be likely to convince any one that they saw him there upon the particular date which they fix and cling to tenaciously.

It appeared upon the trial that Sullivan was accustomed to hanging about and being at this Cuddy's saloon. It did not appear that he had any connection with it, that he worked there, or used it for any purpose except as a resort, a drinking place, or a place of congregating with others of like character at different occasions and on many occasions. The testimony of Arden and Hamlin is that he was there when they were there serving drinks, acting as bartender, and on at least the night in question was there in charge and closed up the saloon. It is past all credence that if this man Sullivan had been an employed bartender upon this night in question, within forty-five miles of the scene of the murder, that his employer, the members of his employer's family, if he had any, and the other bartender, as it appeared on the trial there was a bartender there, would not have been produced on this trial originally to establish this alibi. It is also past belief that Sullivan, innocent of this crime of murder, would have declined himself to go upon the stand and have testified to this complete alibi. He was furnished counsel by the State, and furnished means for procuring any and all witnesses desired. The story bears upon its face every indication of having been fabricated to meet the dire exigencies of the occasion.

Third. O'Reilly and Murphy are shown to have been repeatedly indicted for different crimes in Albany.

This evidence would be introduced for the purpose of discrediting the testimony of Harris the accomplice. Here Harris is claimed, within forty-five miles of the scene of the crime, to have openly stated in the hearing of two persons, within ten days of the tragedy, that he killed Wilson for the murder of whom Sullivan has been convicted. It is an unlikely story. These witnesses are in the part of town in which the saloon of Cuddy is, a familiar place of rendezvous of Sullivan. If they did not know him, as they testified, from the character of the men in the place, it is extremely likely that they would have done everything they could at the time of the trial to have assisted in his acquittal, or

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to have benefited him, as this claimed statement was said to have been made about ten days after the report of the murder. If these men were produced they would be confronted with their record.

A new trial on the ground of newly-discovered evidence will not be granted for the purpose of discrediting a witness solely. Stewart v. Bonnell Co., 20 Misc. Rep. 174.

"In a motion of this character, the court is called upon to consider the question whether the proposed evidence would, if given on the trial, have changed the verdict. That determination necessarily requires the court to consider the probable effect of the proposed evidence and necessarily involves an inquiry into the character of the proffered proof, and the estimate the jury may and properly would make of the character of the proposed witness offering such testimony for the purpose of determining whether the proposed evidence would have changed the verdict." People v. Shea, 16 Misc. Rep. 111, 119. "Nor can this court, in determining whether or not a new trial should be granted on this proposed newly-discovered evidence, adopt the humane rule of giving the prisoner the benefit of any reasonable doubt — which should control a jury in rendering a verdict in a criminal action.

"The proposed evidence must raise a reasonable presumption that its reception would have changed the verdict of the jury, or that, on a new trial, it would produce a different verdict, before the court can order a new trial." Shea case, *supra*, and cases there cited.

I am convinced that the testimony of these two men, were they produced on the trial, and did they swear as they do now, would not be likely to change the result.

It is not a pleasant duty that devolves upon the court of deciding, from conflicting testimony laid before it, as to whether a new trial in a capital case should be granted.

The trend of the decisions is, the common-sense view of the proposition is, that each case must be decided upon its own merits, and as the evidence submitted would seem to warrant.

I can see nothing in this record disclosed before me, and in the oral testimony taken here, that lead me to think that if such evidence had been produced originally upon the trial, it would probably have changed the verdict.

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Hence I am constrained to deny the motion for a new trial.

I deem it only proper to say, in view of the fact that the reprieve of the defendant was originally granted at the instance of and on the application of Rev. Father Curry, of New York city, that the proceedings had before me developed the fact that his action was taken from broad humanitarian views, and with a desire that justice should be done, and that his confidence in the witnesses was evidently misplaced.

Motion denied.

MYRON E. EVANS, Plaintiff, *v.* THE COLUMBIA FIRE INS CO., Defendant.

(Supreme Court, Westchester Trial Term, March, 1903.)

Pleading, in answer to a complaint on an insurance policy — Implied condition therein that all material representations of fact are true — Limiting effect of the rule as to parol evidence.

In the absence of any express provision in the contract of insurance on the subject, there inheres in every insurance policy an implied condition that all material representations of fact, made by the insured to induce the risk and relied upon by the insurer, are true.

Therefore, for the insurer to plead, in answer to a complaint on a policy, a breach of this implied condition is sufficient (instead of pleading fraud or mutual mistake) to enable proof to be made of such misrepresentation.

The rule first above stated is limited and may be affected by the general rule that parol evidence is inadmissible to enlarge, vary or contradict the terms of a written instrument.

MOTION for a new trial on the minutes, the court having directed a verdict for the plaintiff.

Action to recover losses amounting to $13,662.42 on a policy of insurance, issued by the defendant, a New Jersey corporation, to the American Cotton Co., plaintiff's assignor, the risk being for loss or damage by fire, flood, stranding, sinking, derailment or collision.

The policy insured all of the cotton presses of the said American Cotton Co. "located at any point or place throughout the United

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States, * * * to an amount not exceeding $300,000", and provided that the "liability in any one loss shall not exceed $5,000 and that no one single press shall be valued at more than $2,500 and that no double press shall be valued at more than $5,000." The said Cotton Co. had such presses in operation at different places in many states throughout the United States.

The answer pleads as a defence that the said American Cotton Co. at the time the contract of insurance was entered into represented to the defendant that the total number of cotton presses covered by the proposed contract was only about 150 single presses; and that the defendant relied upon the truth of such representation and was induced thereby to make the contract; but that in fact there were 700 of such presses.

The answer pleads as a second defence that after the contract was made, the said insured represented to the defendant that in a few places it had two presses together, and requested the defendant to amend the policy by increasing the amount of its liability for any one loss from $2,500 to $5,000, which the defendant did, relying upon such representation; but that in fact all of the said presses were located two together except in one instance.

The said representations were not set out in the policy, but were oral; and the policy contained no provision that it should be void or voidable if any representation on which it was granted were false.

The court directed a verdict for the plaintiff on the ground that as the representations were no part of the contract they could be proved only on a pleaded defence of fraud.

John Notman for plaintiff.

Albert A. Wray for defendant.

GAYNOR, J.: The case was disposed of at the trial on a question of pleading. There is no defence of fraud pleaded, but only a defence that certain misrepresentations of facts material to the risk were made by the insured to obtain the policy, and relied upon by the insurer.

It is claimed by the learned counsel for the defendant that such misrepresentations make the policy voidable, even though

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they be not fraudulent, and that therefore the pleaded defence is sufficient. This is plainly so where the representations are made warranties by the terms of the policy, or, though not so made warranties, if the policy provide that any misrepresentation shall make it voidable. In the one case the breach of warranty avoids the contract, whether the misrepresentations be material or not; while in the other the misrepresentations also avoid it, because the policy so provides, but only if they be material, unless the language be plainly to the contrary. Obviously, no plea of fraud, but only of breach of contract, like that interposed here, is necessary to present these defences.

These rules are of familiar use in the trial of causes (Fitch v. American Ins. Co. 59 N. Y. 557; Graham v. Fireman's Ins. Co. 87 id. 69). But the present case does not fit either of them. Here there are no warranties in the policy, nor does it provide that it shall be voidable for misrepresentations. We have to do with representations *dehors* the written contract; and they are oral. Unless, therefore, their truthfulness is an implied condition of the contract, they are not of the contract, and their falsity cannot be a breach thereof, and proved under a defence to that effect; and this brings us to the precise point of the case.

If it be an implied condition of all contracts of insurance that they are free from material misrepresentations by the insured which induced the making of them, then they are different in that respect from contracts in general. The general rule of contracts is that such misrepresentations avoid a contract only on the ground of fraud, or of mutual mistake of fact, and such a defence has to be pleaded. This rule is ample for every case of misrepresentation inducing a contract, and it is not apparent why insurance contracts, any more than any other, should need an additional rule of an implied condition that the contract is free from inducing misrepresentation. As Lord Mansfield said on the subject in the early insurance case of *Carter* v. *Boehm* (3 Burr. 1905): "The governing principle is applicable to all contracts and dealings"; and he considered the question as one of fraud, either actual or constructive. In no case have I found the matter of mutual mistake of fact mentioned as a defence to an action to recover for a loss on an insurance policy; nor could it arise except in recent years, and only in those jurisdictions having a new system of pleading and practice under which such a defence

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could be interposed in a common law action. A suit in equity to cancel the contract on that ground would always lie, however, and the common law action would be stayed meanwhile.

The question of pleading which is before us is not discussed in any judicial opinion or text book which has been cited to me, nor have I found any mention of it. If, however, it be an implied condition of contracts of insurance that all material representations of fact by the insured *dehors* the written contract are true, then it follows that every action to recover on an insurance policy for a loss allows of a defence of breach of such condition, the very same as though such condition were expressed in the policy; and therefore the defence of fraud or of mutual mistake of fact, based on such misrepresentations, is not necessary, but only optional.

An early and leading case in this country, always cited for the proposition that a misrepresentation of a material fact by the insured avoids the policy, is *Carpenter* v. *American Ins. Co.* (1 Story, 57). The headnote of that case is as follows: "A misrepresentation of a material fact, whether it be made through mistake or design, avoids a policy of insurance underwritten on the faith thereof"; and it is fully supported by Judge Story's opinion. But when you read the statement of facts which precedes the opinion, you learn that the representations there were contained in two letters which are in terms referred to in the policy, and expressly made part of the contract. The case is therefore manifestly of no weight or relevancy on the question whether representations *dehors* the policy are impliedly of the contract. The language of the headnote and of the opinion is large, but its scope must nevertheless be restricted to the facts of the case. Judicial opinions in this country have ever since continued to use the same language, but when the facts are looked to the representations are invariably found to be made warranties by the policy, or else the policy contains the less stringent general provision already mentioned that the falsity of any representation shall avoid the contract. The recent case of *Armour* v. *Transatlantic Fire Ins. Co.* (90 N. Y. 450) may be referred to as typical. The headnote is as follows: "A material misrepresentation made in applying for a policy of insurance will, although honestly made, avoid the policy." Notwithstanding this broad generalization, the report of the case discloses that the applica-

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tion was in writing, and that the policy contained a provision that "any misrepresentation whatever, either in a written application or otherwise, should avoid the policy" (p. 455). Most of the text books, especially the more recent ones, display a great lack of scientific accuracy and classification on this point; many of them, after the manner of modern text books, being wholly made up of extracts from judicial opinions, which, detached from their context, are hopelessly contradictory, and serve more to mislead and confuse than to enlighten (Joyce on Ins. §§ 1882-1935).

For a long time after the case of *Carter* v. *Boehm* (supra), the rule as it seems to have been considered by the English courts was, as is pointed out in the scientific and discriminating text book on insurance by *Mr. Arnould* (§ 525, 7th ed.), that "although (in a given case of misrepresentation) no pretence existed for alleging actual fraud, yet the policy was to be considered void on the ground of constructive or legal fraud, i. e., such conduct on the part of the assured as, though it does not imply any moral turpitude in himself, yet, from the effect it has in fact of misleading the underwriter, is in legal language said to be fraudulent." The contract of insurance being one peculiarly dependent on the representations of the insured, the law correspondingly requires of him *uberrimina fides* in the making of it; and on that principle of the strictest good faith on his part, fraud could the more easily be based in all cases on misrepresentations made through mistake, ignorance or accident. This enabled such fraud to be found in insurance cases when it might not be found in cases of other contracts.

Mr. Arnould does not manifest complete satisfaction with this rule, though he accepts it apparently for the sake of consistency, it being at one with the general rule applicable to contracts. Mr. Phillips in his equally scientific and able work on insurance refuses to adhere to it, and rests the avoidance of insurance contracts for misrepresentations *dehors* the written contract also on the ground of an implied condition of the contract that there were no material misrepresentations. He says: "The effect of a misrepresentation or concealment in discharging the underwriters does not seem to be merely on the ground of fraud, as has usually been laid down by writers on insurance, but also on the ground of a condition implied by the fact of entering into

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the contract, that there is no misrepresentation or concealment." And again, after discussing the subject: "The forfeiture of the insurance by misrepresentation is a forfeiture by a breach of a condition of the contract. So it seems to have been considered by Chancellor Kent." The statement of Chancellor Kent referred to is as follows: "A positive representation on a material point is essentially a part of the contract, and essentially a warranty, though it be not inserted in the policy" (3 Com. 282). Though this be inaccurate in respect of representations *dehors* being warranties, it nevertheless shows the general opinion of the author on the point that the truth of such representations is an implied condition to the validity of the contract.

The view of Phillips is set forth and adopted by Lord Esher in his luminous opinion in the case of *Blackburn* v. *Vigors* in the Court of Appeal (17 Q. B. D. p. 561), and apparently accepted by the other judges in the case. It is also adopted in a *dictum* of Judge Rapallo in the *Armour* case (supra); and its general acceptance would do away with all confusion in text books and judicial opinions between cases where the policies provide for the avoidance of the contract by false representation or warranties, and those where the policies contain no such provision, and the representations are *dehors*. The case of *Campbell* v. *New England Life Ins. Co.* (98 Mass. 381) is also instructive on the subject.

I therefore conclude that as there is in every contract of insurance, in the absence of an express provision on that head, an implied condition of the truth of all material representations of the insured on the faith of which the contract is made, a pleaded defence of the breach of such condition suffices; that it is optional with the defendant to plead it instead of a defence of fraud or of mutual mistake of fact.

The foregoing rule is subject to the rule applicable to insurance contracts, the same as to all other contracts, that oral evidence cannot be received to add to, vary or contradict the terms of a written contract, and may be affected and is limited by it (Walton v. Agricultural Ins. Co., 116 N. Y. 322; Mayor v. Brooklyn Fire Ins. Co., 4 Keyes, 465; New York Ins. Co. v. Thomas, 3 Johns. Cas. 1; Alston v. Mechanics' Mutual Ins. Co., 4 Hill, p. 342).

Oral evidence of the defence pleaded in this case will not violate

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such rule. The defendant insured all of the cotton presses of the plaintiff throughout the United States. It does not seek to change that contract; it desires to show that it took the risk on the faith of a representation of the insured that it had only 150 of such presses, whereas it had 700, and that only a few of them were in couples, whereas substantially all were in couples; and, as we have seen, the truth of such representation is an implied condition and part of the contract. That the number of presses, and their proximity to each other, affected the risk, and were therefore material, seem to be plain.

The motion for a new trial is granted.

Matter of the Judicial Settlement of the Account of ROBERT C. HEWITT, as Sole Surviving Executor of EDWARD GOODHEART, Deceased.

(Surrogate's Court, Kings County, March, 1903.)

Trust — Savings bank deposit — When additional to a debt due the beneficiary from the depositor — In New York city land taxes accruing before a testator's death are not a "debt" payable out of his personalty.

Where a person, since deceased, opens an account "in trust" for one who is then his creditor, a trust, additional to the debt to the creditor, is created for the latter where it appears that the decedent intended to create a trust and did not intend it as a payment of the debt.

Taxes in New York city being a lien upon the particular property and not a personal charge against the owner thereof, an executor there cannot, although taxes on land of his testator have accrued before his death, pay them out of the personalty as "Taxes assessed on the property of the deceased previous to his death" (Code Civ. Pro., § 2719, subd. 2), and particularly where the executor is devisee of the land.

PROCEEDINGS upon the judicial settlement of the account of an executor. Objections to account.

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Richard B. Kelly, for executor.

George W. Pearsall, for creditor Anna Fithian.

CHURCH, S. Objections are filed by a creditor to the executor's account.

The deceased opened an account in a savings bank in trust for the executor Robert C. Hewitt for the sum of $250; it also appears that the deceased had made two notes of $100 each to Robert C. Hewitt. Counsel for the contestant contends that such account should be treated as a part of the estate of the deceased or that it should be regarded as a payment by the deceased to the executor of said notes, and therefore that either the executor should charge himself with the amount of such deposit or that he should not be allowed to place such notes among the debts of the deceased.

In numerous decisions it has been held that an account opened in this manner creates an irrevocable trust in favor of the *cestui que trust* unless it can be shown to be plainly the intention of the testator not to create such trust. In this case the contestant has called the executor to the witness stand and questioned him in regard to the transaction, and his testimony is clear and explicit to the effect that after the deceased opened the account in this fashion he stated specifically that it was done for the purpose of making a gift to the executor, whom he evidently regarded as his friend. Thus the presumption created by the form of the deposit is absolutely confirmed by the testimony of the executor.

As to the contention that it was intended in the nature of a payment, there is nothing to assist the contention upon this subject except the presumption that the amount being slightly in excess of the amount of the notes that such was naturally the intention of the deceased. Standing alone, without the testimony of the executor upon this subject, the deposit being slightly in excess of the amount of the notes would raise a very strong suspicion that it was evidently a method of payment intended by the deceased, but upon this proposition the contestant has chosen to question the executor, and the executor swears specifically that at the time that the deposit was so made no mention whatever was made by the deceased that it was intended as a payment on

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the notes, nor was there any reference, directly or indirectly, made to the notes at that time.

Therefore there is no evidence which would warrant me in making a finding that this deposit was other than as indicated on its face, or that it was intended for the payment of these notes, and the executor, therefore, has properly drafted his account in regard to these two items.

The other objection to this account is that the executor has paid, out of the personal estate of the deceased, certain taxes and assessments levied in deceased's lifetime upon real estate, situated in the city of New York, which was specifically devised to the said executor in his individual capacity.

Counsel for the executor contends that under the provisions of section 2719 of the Code these taxes were entitled to be treated as debts of the decedent, and that, therefore, being debts of decedent, it was the executor's duty to satisfy them out of the personal estate. This proposition, it seems to me, is correct in the abstract reference to taxes, as taxes as they are generally imposed constitute a personal obligation which must be paid by the citizen, for nonpayment of which personal process in the nature of distress or the sale of his goods may be enforced against him or his personal property. But, in relation to taxes imposed on property situated in the city of New York, and local assessments therein, the rule is different, as such taxes or assessments are made a lien upon the particular property, and are not a general or personal charge against the individual owning the same. The proceedings for their collection are entirely in *rem*, and no relief can be enforced against the owner of the same. This distinction is clearly pointed out in the case of Krueger v. Schlinger, 19 Misc. Rep. 221. That being the case, the executor, who was a specific devisee of this property in question, had no power to pay the taxes and assessments which were a lien upon such property during the lifetime of the deceased from out of the personal estate of said decedent, and, consequently, such payments should be disallowed.

Let decree be settled accordingly.

Decreed accordingly.

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Matter of the Estate of AUGUSTUS CRUIKSHANK, Deceased.

(Surrogate's Court, Kings County, March, 1903.)

Compulsory accounting — Code Civ. Pro., § 2727 — Statute of Limitations.

A motion to compel the executrix of a trustee to account to a successor trustee to the end that the latter be paid a judgment, which he recovered as trustee in an action brought against the executrix for an accounting of the trust, is a proceeding to recover a demand that was due and as such is not governed by the ten years' Statute of Limitations and is barred by the lapse of six years — in analogy to an action at law.

MOTION to compel an accounting under section 2727 of the Code of Civil Procedure.

George Putnam Smith, for petitioner.

Louis A. Noble, for respondent.

CHURCH, S. This is a motion by a judgment creditor of the estate to compel an accounting under section 2727 of the Code. Decedent died October 4, 1894. Letters testamentary were issued herein on November 2, 1894.

The decedent had been trustee of the estate of Benjamin Lord, deceased. The present petitioner was appointed as such trustee January 21, 1895. In May, 1895, said trustees brought an action for an accounting against said executrix, and the executrix made an account of the acts of said deceased trustee, showing a balance of $3,921.17, which she paid over to the petitioner.

Certain assets came into the hands of the executrix, which she distributed. Thereafter, the said petitioner, as the said trustee, on June 17, 1899, obtained a judgment in said action against the executrix herein for $17,968.77, and a transcript was duly filed in this county July 15, 1902. It is contended that this motion, being made after the six years' Statute of Limitations, is barred.

Counsel for the petitioner contends that the right to such an accounting is absolute under authority of Matter of Taylor, 30

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App. Div. 213, but the Appellate Division, in Matter of Longbotham, 38 id. 607, stated that they had overlooked Matter of Rogers, 153 N. Y. 316, and that, therefore, their decision in Matter of Taylor was erroneous. They also stated that such case decided "that a proceeding to compel an administrator to account is controlled by the ten-year Statute of Limitations applicable to suits in equity." The Statute of Limitations thus does apply to this proceeding, the only question being whether it is the six or the ten years period.

In the Longbotham case the period was considerably in excess of ten years, so it made no difference which period applied. It seems to me that the court, in the Matter of Longbotham, mistook the decision of the Court of Appeals by interpreting it to mean that all proceedings to compel an executor to account were controlled by the ten-year Statute of Limitations only.

The learned court says, in Matter of Rogers, 153 N. Y. 323: "If Mrs. Moore had applied as next of kin, her proceedings would have been analogous to an action at law to recover a demand that was due, *and, hence, would have been governed by the shorter period named.*"

Here the application is made to "recover a demand that was due" and being made after more than six years is barred by the Statute of Limitations.

Motion denied.

Matter of the Application of JULIET DENTON for the Sale of the Real Estate of HENRY R. VALENTINE, Deceased, for the Payment of His Debts.

(Surrogate's Court, Kings County, March, 1903.)

Sale of decedent's real estate — Publication of citation not required to be completed eight days before the return day — Code Civ. Pro., §§ 441, 2520, 2524.

A citation, issued in a proceeding to sell a decedent's real estate, is not invalidated by the fact that service thereof by publication was not completed more than eight days before the return day and it is sufficient for jurisdiction that publication was completed before that day.

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Misc.] Surrogate's Court, Kings County, March, 1903.

The Code provision that service of a summons and complaint upon a defendant by publication is not complete until the last day thereof does not apply to or govern a citation.

A citation is unlike a summons in that it contains a fixed return day and no demand that the party served appear and answer within a fixed time.

It is sufficient that service of a citation is made after issue and eight days before the return day.

PROCEEDING for the sale of decedent's real estate. Motion to dismiss proceedings.

Bailey & Sullivan, for petitioner.

McKenzie & Beebe, for A. M. Valentine.

CHURCH, S. This is a proceeding for the sale of decedent's real estate. An heir-at-law appears and moves to dismiss the proceedings on the ground that the citation was served by publication, and that eight full days did not elapse between the date of the last publication and the date when the citation was made returnable.

The question raised here appears never to have been raised before, so far as an examination of the public reports will disclose. In the case of the service of a summons and complaint by publication the provisions of the Code of Civil Procedure, § 441, governing the service of a summons, provide that service of a summons is not deemed complete until the day of the last publication. The heir-at-law, therefore, contends that by like reasoning the service of the citation should not be deemed completed until the last day of the publication of the citation and that, therefore, eight full days should be given after the service is completed; but, it seems to me, that the objector has overlooked the following distinction between a citation and a summons, namely: That there is no fixed date in advance for the return of a summons, as there is for a citation, but there is a general provision that the party shall have twenty days in which to appear and answer after service, irrespective of whether the service is personal, substituted service, or service by publication. In the case of a citation there is no provision that the party has

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eight days to appear after the service of the citation; on the contrary the return day of the citation is fixed before it is issued, and it is then provided by section 2520 of the Code that the service, if personal, must be made at least eight days before the return; hence it may be, and in fact often is served a number of days in excess of the eight days required by the Code. This section of the Code also states that service must be made in the above manner "except where special provision is otherwise made by law."

Where it is necessary to make service by publication it is provided (Code, § 2524), that the service be made by publication in the newspapers not less than once in each of six successive weeks, and also by a deposit in the post-office. It will be observed in this latter section that there is no reference whatever to the fact that such publication must be completed more than eight days before the return of said citation, but the direction is simply that the publication shall be completed previous to the return day of the citation.

If it was the intention of the Legislature to require that the parties should have the additional time after the last day of service by publication of the citation, similar to that given for the service of a summons, there is no question but that it would have been properly and clearly stated, and where there is an omission to so specifically indicate we are not justified in assuming that it has been done by oversight of the Legislature, but, on the contrary, it should be deemed to have been done for a specific intent and purpose.

Statutes providing for service of papers and granting jurisdiction to courts should certainly be strictly construed, but such strict construction does not warrant the courts in adding to or amending the specific intent of such legislation.

It seems to me, therefore, that the service has been made properly in this proceeding, and that the court has jurisdiction of the same.

The preliminary motion to dismiss is, therefore, overruled.

Motion denied.

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Matter of the Estate of JOHN DANIELL, Deceased.

(Surrogate's Court, New York County, March, 1903.)

Transfer tax — Nontaxability of a testamentary provision intended in possible substitution for an annuity created by the testator in his lifetime — Election.

Where a husband has, through a trustee, agreed to pay his wife, in release of all her rights against him or in his estate, a life annuity accompanied by the option to her of demanding of his estate upon his death, in substitution, such gross sum, calculated upon her expectancy of life from and after the date of his death, as will discharge prospective payments of annuity, his creation by will in his executors of a trust to continue the annuity in case she refuses a gross sum, is not — failing her exercise of her election — taxable to her as to the corpus, for the will has transferred nothing to her and she has received no benefit under it.

***Semble*, that the wife must exercise such an election immediately upon her husband's death and is not, after having received the annuity for some time thereafter, entitled then to demand a gross sum calculated as of the date of his death.**

APPEAL from an order fixing the transfer tax.

Edward A. Blackmar, for executors.

Edward H. Fallows, for State Comptroller.

FITZGERALD, S. Appeal by the executors from an order fixing the transfer tax. The decedent died in March, 1902. On June 14, 1898, an agreement was entered into between the decedent, Albert Wilkins, trustee, and Anna W. Daniell, the wife of testator, by which the decedent agreed to pay to Wilkins $2,500 a year during the lifetime of decedent's wife, for her use and benefit. The agreement also provided that in case decedent's wife survived him, the trustee Wilkins might (if the wife elected so to do) demand payment from the estate of a gross sum in satisfaction of the payments thereafter to fall due under the agreement; such sum to be ascertained by multiplying the amount of

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the annuity by the expectancy of life of the wife according to the Northampton Tables, as of the date of the death of the decedent. The wife accepted the provisions of this agreement in lieu of all claims for support against the decedent and in lieu of dower and also in lieu of any claim to a distributive share of the decedent's estate. Former articles of agreement (presumably relating to the same subject-matter) made between the same parties in December, 1887, are cancelled and the covenants in this agreement substituted. The brief of the Comptroller states the decedent and his wife were separated, but I find no evidence in the record on this subject.

The will of decedent was executed in 1901. The tenth paragraph recites the agreement hereinbefore set forth, and authorizes his executors, in case his wife shall not elect to receive a gross sum in lieu of said annuity, to set apart the sum of $40,000, which he gave to his executors in trust, to invest and apply the income, so far as it will suffice, to the payment of said annuity; and to make up any deficiency from the principal. Upon the death of his wife, or upon the acceptance by her of a gross sum in lieu of said annuity, the trustees are directed to divide the balance between the two sons.

The appraiser not only refused to deduct the value of this annuity as a debt or obligation owing from the estate, but reported its value as a taxable transfer under the will to the wife. The order fixing the tax was entered accordingly, and from this finding the executors appeal.

Nothing was transferred to the testator's widow by the tenth paragraph of the will. That clause is a mere direction and authorization by the testator to his executors as to the manner in which the obligation created by the agreement of June 14, 1898, should be provided for, in the event that the widow failed to exercise the election given thereunder. It is simply a direction of the testator as to the manner in which his estate shall be administered. It confers no benefit upon the widow. The election to take a gross sum has not been exercised. It is doubtful if it can now be exercised. The agreement provides that the gross sum to be paid shall be computed according to the expectancy of life of the widow at the death of the decedent. The decedent died in March, 1902; nearly a year has elapsed. Would a court of equity construe the agreement so that the wife might draw

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her annuity for an indefinite period and then receive a gross sum calculated as of the time of the decedent's death? It seems manifest that the agreement contemplated that the election should be exercised soon after the testator's death, and the method of ascertaining the gross amount was thus specifically defined.

The decision in the Gould case, 156 N. Y. 423 is readily distinguishable from the case at bar. There "The son consented to accept payment for his services under this provision of the will." p. 426. It is only where the "devise or bequest is accepted by the beneficiary that the transfer is made by the will, and the state by the statute in question makes a tax to impinge upon that performance." p. 428. "That Jay Gould attempted to transfer the property mentioned in the codicil to his son George by will appears upon the face of the instrument. That the son agreed to accept the transfer of the property to him by that method, appears from his testimony that he stated to his father that the provision for compensation was satisfactory and that he had accepted the benefit of this provision is unquestioned. The result, therefore, is a transfer to him by will of the property therein described, and the statutory command that upon property thus transferred a tax should be imposed must be obeyed." See also Matter of Rogers, 71 App. Div. 461, aff'd 172 N. Y. 617; Matter of Miller, 77 App. Div. 473; s. c., 78 N. Y. Supp. 930.

I conclude, therefore, that the appeal must be sustained; that so much of the tax levied against the widow as is based upon the annuity under the agreement must be stricken out and its value deducted from the taxable estate as a debt or obligation.

Appeal sustained.

Matter of the Estate of Patrick J. Smith, Deceased.

(Surrogate's Court, New York County, March, 1903.)

Trust — Savings bank deposit — Intent of living donee — Consolidation in Surrogate's Court — Code Civ. Pro., § 2727.

Where a woman deposits her own money "in trust" for her husband, always retains the savings bank book, never informs him of the matter, testifies that she never intended he should have the money unless he survived her, and draws it all out after his death,

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there is no trust, for the husband in the money, which his administrator can enforce against her.

There should be no separate accountings of two administrators of one estate.

Where the parties have stipulated that one administrator shall account in a proceeding brought for that purpose by the other, the surrogate will carry out the stipulation, consolidate the proceedings, and direct distribution to be made by both administrators

PROCEEDINGS upon the settlement of the accounts of an administratrix.

Isaac N. Miller, for administratrix.

Dunphy & Pearsall, for administrator.

THOMAS, S. The proceeding to settle the accounts of the administratrix was first commenced, and an order of reference was made to Mr. John A. Foley, as referee. It became quite apparent to the parties that no final adjudication upon the rights of persons interested in the fund could be made without an account also being had by the administrator. Thereupon, without any order of a surrogate, but on the agreement of the parties, the account of the administrator was filed with the referee; objections were also filed with him, a stipulation was made that the two accountings be consolidated, and evidence was taken, with the acquiescence of all concerned, as if there was one consolidated proceeding which included both accounts. At the end of the hearing the referee suggested that this method of procedure might be irregular, and a due formal proceeding for the accounting by the administrator was thereafter commenced; objections were filed, and an order of reference to the same referee was made, on the motion of the attorney for the administrator, which included a provision "that the testimony already taken stand as the testimony of the parties to said accounting."

The brief submitted to me by the attorney for the administrator on the argument of this application to confirm the report of the referee is a copy of the brief submitted by him to the referee, and is entitled, "In the matter of the judicial settlement of the accounts of Ellen M. Smith and John P. Smith as coadministrators of the estate of Patrick J. Smith, deceased." No request

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is to be found in the document to treat the two proceedings separately. The referee made one report entitled in both proceedings, but carefully separated the findings on issues of fact raised in each of them. There is not the slightest confusion and, if justice required, two reports could easily be made of the one without any material change.

In the face of these facts the first objection of the administrator is that there should be two reports. The method pursued by the referee was in conformity with the stipulation and understanding of the parties; he has duly reported on every issue raised in each of the proceedings, and I decline to set aside his whole report because he has embodied his conclusions in one document rather than in two.

It is quite obvious that the two proceedings should end in a single decree in order to avoid great confusion. I will, therefore, pursuant to section 2727 of the Code of Civil Procedure, and on my own motion, order that the proceedings be consolidated.

The referee recommends a decree that the entire assets of the estate in the hands of the administrator be paid over by him to the administratrix, to be by her distributed among the persons entitled. Such a provision would tend towards simplicity in the terms of the decree, and possibly make its method of enforcement clearer, but it would amount to a removal of the administrator in a proceeding brought for an entirely different purpose, in which no prayer for his removal is to be found, and without adequate cause for such removal. The exceptions pointed to this recommendation must be sustained, and the decree for final distribution must direct payment by both administrators, out of the assets in their hands, to the persons ultimately entitled.

The savings bank deposits made by and in the name of Ellen M. Smith, now the widow and administratrix, "in trust for Patrick J. Smith," were of her own money; she retained the bank-book at all times, and since the death of her husband she has withdrawn the money and used part of it for her support. There is no evidence that she ever informed her husband of the account or that he had any knowledge of it. Mrs. Smith testified that, at the time of opening the account and of making the deposits, it was her intent that her husband should have the money only if he survived her. On these facts her title to the money is sustained by the referee and is challenged by the administrator.

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If Mrs. Smith had died before her husband, leaving the account open and unexplained, the form in which the deposit was made would have raised a presumption of an intent on her part to bind the money by a trust in his favor and, in the absence of evidence to the contrary, such trust would have been deemed established as an irrevocable transfer of an interest to him. Martin v. Funk, 75 N. Y. 134; Willis v. Smyth, 91 id. 297; Grafing v. Heilmann, 1 App. Div. 260, aff'd 153 N. Y. 673; Decker v. Union Dime Savings Inst., 15 App. Div. 553; Williams v. Brooklyn Savings Bank, 51 id. 332; Harrison v. Totten, 53 id. 178; Robertson v. McCarty, 54 id. 103; Scallan v. Brooks, id. 248; Meislahn v. Meislahn, 56 id. 566; Hyde v. Kitchen, 69 Hun, 280; Millard v. Clark, 80 id. 141; Matter of Biggars, 39 Misc. Rep. 426. The presumption of intent to create a trust would suffice to establish a *prima facie* case, but it would be subject to contradiction by proof of surrounding circumstances, or of the acts and declarations of the depositor forming part of the *res gestæ*, or declarations of the beneficiary against his interest, tending to show that, at the time of the deposit, such interest did not exist. Washington v. Bank for Savings, 171 N. Y. 166, aff'g 65 App. Div. 338, the beneficiary was fictitious; Matter of Mueller, 15 App. Div. 67, declarations of beneficiary against interest; Decker v. Union Dime Savings Inst., id. 553; Meislahn v. Meislahn, 56 id. 566. The drafts made by Mrs. Smith would, in such a case, have been regarded not as evidence bearing on the intent with which the money was deposited, but as showing a change of purpose and an intent to convert the property of another to her own use, and her personal representatives would be required to restore the money. Mabie v. Bailey, 95 N. Y. 206, some proof of affirmative declarations in this case; Farleigh v. Cadman, 159 N. Y. 169, modifying 11 App. Div. 628, the evidence of intent was clear and the findings of fact were binding upon the court; Robertson v. McCarty, 54 App. Div. 103; Robinson v. Appleby, 69 id. 509; Hutton v. Smith, 74 id. 284; there were explicit declarations of the depositor showing the intent in making the deposit.

In each and every of the cases above cited the depositor died before the beneficiary, and the controversy arose between the beneficiary, or his legal representative, and the legal representative of the depositor. In at least two cases it was determined that the presumption from the continued possession of the pass-

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book by the depositor, with its attendant power of control, was that the trust period terminated only with the life of the depositor, and that no right of action accrued to the beneficiary until the death of the depositor. Mabie v. Bailey, 95 N. Y. 206, 212; Hutton v. Smith, 74 App. Div. 284, 291.

After a careful search I have been able to find only three cases in which it has been attempted to require the person making such a deposit to recognize in his lifetime a right in such beneficiary. In Cunningham v. Davenport, 147 N. Y. 43, a deposit was made of his own money by one brother in trust for another; the passbook was kept by the depositor; the beneficiary died and the depositor withdrew the fund and converted it to his own use. In an action brought against the depositor by the legal representative of the beneficiary to recover the money, the depositor testified that, in making the deposit he did not intend to benefit his brother or his brother's representatives. The relief was denied and the court said: "We have here a case of a man who takes his own money and deposits it to his own credit in trust for another, making no disclosure or publication of the trust, treating it apparently as a mode of transacting his own business, and then survives the proposed beneficiary. We are of opinion that such a transaction does not create a trust." It will be observed that the fact that the depositor denied, under oath, that he had an intent to create a trust, was not treated as a necessary part of his defense, and in a somewhat similar case, where the depositor died before the commencement of the action, but after the beneficiary and after the conversion of the fund, and there was no direct proof of intent, the same result was reached. Haux v. Dry Dock Savings Inst., 2 App. Div. 165, aff'd 154 N. Y. 736.

In Lee v. Kennedy, 25 Misc. Rep. 140, aff'g 19 id. 352, a deposit was made in trust for a niece, who subsequently displeased the depositor and the money was drawn out. An action was commenced against the depositor, who testified to declarations made to a clerk of the bank at the time of the deposit, to the effect that "she is not to get it until after my death, and unless she remains with me she won't get it." It was held by the Appellate Term, Beekman, J., writing, that there was no enforceable trust.

In Weber v. Weber, 58 How. Pr. 255, a father had deposited his own money in four accounts, in trust for each of his four children. Family difficulties ensued; he withdrew the money

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and the action was against him. He testified that, at the time of the deposits, he stated to the bank clerk that it was his money, that he had no objection to his children having it after his death, but that he wanted to control it as long as he lived, and that he was told by the clerk that it was his money and that he could get more interest by depositing in that way. It was held by Van Vorst, J., that there was no trust.

On these authorities I conclude that the decision of the referee was as technically correct as it is obviously equitable and just.

In all particulars not specially covered by this memorandum the very careful and satisfactory report of the referee is confirmed. Tax costs and settle decree on notice.

Decreed accordingly.

Matter of the Estate of Asa Truesdell, Deceased.

(Surrogate's Court, Putnam County, March, 1903.)

Administration — Removal of executor for cause.

It is a sufficient ground for the removal of a sole surviving executor that he has neglected and delayed the administration of the estate and has filed a verified petition in bankruptcy in which he has stated that he is a bankrupt.

Application by an assignee for the removal of an executor.

George Wood, for petitioner.

Joseph A. Greene, for executor.

Southard, S. This proceeding comes before the court upon the application of Emma C. Truesdell as assignee of the right, title and interest of James H. Truesdell in and to the real and personal property of Asa Truesdell, deceased; the said James H. Truesdell being a son of Darius Truesdell, who was entitled under the last will and testament of the said deceased to certain properties and undivided interest therein.

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The application is made by the said Emma C. Truesdell, as such assignee, to have Titus B. Truesdell, the sole surviving executor under the last will and testament of the decedent, removed, and the letters testamentary granted to him canceled and revoked. Sylvester B. Truesdell, who with said Titus B. Truesdell was also nominated in said last will and testament as an executor, although duly qualifying thereunder, has died subsequent to probate of said will and prior to filing of the petition herein.

The grounds upon which the relief is prayed for are that the moneys and property of the estate of the decedent have been appropriated by the executors and have been by them used to their own benefit and not applied as provided by said will. That Titus B. Truesdell, as such executor, has denied that the petitioner has any rights as such assignee, and that the said executor has transferred his interests in the property to divers members of his own family, and that he is a bankrupt and is not qualified to retain position of executor and trustee under said will, and that the circumstances of said executor are such that they do not afford adequate security to the petitioner or to other persons interested in said estate for the due administration thereof.

It appears from the inventory filed in this estate in Putnam county surrogate's office, on or about January 11, 1878, that at that time there was upwards of $40,000 in personal property, in addition to the several parcels of real estate, which are by said will specifically bequeathed.

The widow of the decedent died prior to the filing of the petition herein, and it appears that thereafter Titus B. Truesdell, as such executor, advertised for sale and did sell the real estate, the use of which was devised to the said widow during her life and the sale thereof directed to be had after her death, and that the said executor has testified that he has received the money for that sale, in all the sum of $3,000, and that he has distributed that sum among several members of his family, pursuant to an alleged assignment of his interests therein, and he has testified that the balance remaining, which he states is $700, his son holds for him, but he has taken no evidence of debt for it.

It appears from the evidence that while Sylvester B. Truesdell during his life appropriated some portions of the estate, that these appropriations were known by the surviving executor a long time prior to the commencement of these proceedings, and that

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no action was taken by him to obtain restitution except an alleged assignment by Sylvester B. Truesdell to Titus B. Truesdell of the interest of the said Sylvester B. Truesdell in and to this estate.

The surviving executor has testified that the only assets now existing in the estate is the balance of the proceeds from the sale of the property directed by said will to be sold, and which was sold to Fannie L. Pierce, formerly Fannie L. Davis, a daughter of decedent and a legatee under said will, who is now living, and a parcel of real estate at Tarrytown, New York, which the executor has testified was, at the time of his father's death, in the form of a mortgage, which was subsequently foreclosed and the property taken in the name of the executors of the estate, and which George Truesdell, also a legatee under said will, now holds in lieu of specific bequest made to him by that will.

It appears that this sale was made by the executor in the face of a restraining order issued in an action by the petitioner herein against the two executors of said will, and that this order sought to restrain this executor from transferring the property which he sold during the pendency of that action.

The executor has testified that, while the will of the decedent bequeathed to the widow certain bank stocks and cash, the use of which the decedent's widow was entitled to during her life or until she should remarry, the major part of the moneys, the use of which was so bequeathed to her, was used in paying an assessment on that bank stock.

It appears by the will of decedent that after the sale of the property bequeathed to the widow for life, or until she should remarry, the proceeds of that sale should be equally divided between the decedent's children, and that after certain other specific bequests the residue and remainder of the decedent's property was devised and bequeathed to his children equally.

It does not appear that any effort was made to collect the property of the decedent, which, as shown by the inventory, was in chattels, notes, accounts, mortgages and money, nor that the executors ever took that property into possession.

It further appears from the evidence that the surviving executor has denied that this petitioner, as assignee of James H. Truesdell, who is a son of a deceased son of Asa Truesdell, has any right or interest in the property of this estate, and that this executor did file a petition in bankruptcy, verified by his oath, in

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which he stated that he was a bankrupt, and it seems from the evidence taken together, that the estate of the decedent, the collection of the claims due to the estate, and the due administration of its affairs have been neglected and not properly proceeded with, and that the circumstances are such that the petitioner and the other persons interested in this estate are not afforded adequate security, as it stands at present, for the due administration thereof.

It is, therefore, the decision of this court that the allegations of the petition have been sustained, and that a decree be entered revoking the letters testamentary heretofore issued in this estate on the 9th day of June, 1876, to Titus B. Truesdell and Sylvester B. Truesdell as executors of the last will and testament of Asa Truesdell, deceased, and under which the said Titus B. Truesdell by reason of the death of Sylvester B. Truesdell heretofore is now the sole acting executor.

Decree to be entered accordingly and costs to be taxed upon notice.

Decreed accordingly.

JAMES A. ROBERTS, as Receiver of The Metropolitan Savings and Loan Association of Buffalo, N. Y., Plaintiff, *v.* MARY A. MURRAY et al., Defendants.

(County Court, Niagara County, March, 1903.)

Loan association — Usury — Equities of borrowing members where the association is insolvent.

An agreement, by the terms of which a savings and loan association, incorporated under L. 1851, ch. 122, exacts from a borrowing member not only interest on a loan made by it but also premiums thereon, is not usurious.

Where the association becomes insolvent and a receiver thereof proceeds to foreclose a mortgage given by a member as security for money borrowed from the association, such member should be charged with the loan and interest thereon to judgment but cannot be charged with premiums agreed to be paid. Any premiums paid by such member must be credited upon the loan.

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Dues on stock paid in by such member are not to be considered in the foreclosure action and can be neither charged therein to the member nor offset in the member's favor against the loan.

All moneys so paid in as dues must await the final distribution by the receiver and the member must accept such dividend thereof as the courts may declare.

ACTION to foreclose a mortgage.

Clark H. Timmerman, for plaintiff.

King, Leggett & Brown, for defendants Murray.

HICKEY, J. In December, 1898, the defendant Mary A. Murray became a member of the Metropolitan Savings & Loan Association, incorporated under chapter 122, Laws of 1851, now in the hands of plaintiff as receiver. As such member there were issued to her sixty-two shares of class "A" stock. Under the by-laws of the association she was required to pay dues on this stock, amounting to $15.50 a month. Upon becoming a member she immediately made application to the association for a loan of $5,400. This application was granted. At the suggestion of some of the officers of the association $4,240 of the amount asked for was obtained by the defendant Mary A. Murray from the Niagara County Savings Bank, to secure which she gave her bond and a mortgage upon the real estate described in the complaint in this action. The balance of the $5,400 loan applied for, being the sum of $1,160, was advanced to her by the association, and she thereupon executed and delivered to the association her bond and a mortgage upon the same property covered by the bank mortgage as security for the full amount of the loan. This mortgage was made a junior lien to the bank mortgage. The defendant Sheldon T. Murray is the husband of the defendant Mary A. Murray and joined with her in the bond and mortgage last above described. By this bond and mortgage the loan association assumed in a limited or conditional way the payment of the bank mortgage; and it appears that the interest on the bank mortgage has been paid by the association and receiver down to July 1, 1902, amounting to $890.40. The bond and mortgage given to the association, among other things, provided for the

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payment by defendants of interest at the rate of 6 per cent. on the full amount of the loan, namely, on $5,400, and for the payment of premiums amounting to $13.50 a month, both interest and premiums to be paid monthly, and to continue until a sufficient sum should be to the credit of defendants in dues paid and apportioned profits to fully pay said principal sum together with all fines and fees that might be lawfully charged against said shares. The bond and mortgage also further provided that in case default be made in the payment of interest, premiums, dues, fines or fees, and the same or any part thereof should remain unpaid and in arrears for three months from the time the sum so in default became due and payable, then the whole of said loan or advance and all sums secured by the bond and mortgage should at the option of the board of directors become due, and the association was authorized to proceed to enforce collection.

The defendants have paid to the association in cash $1,375. Of this sum $403 represent dues paid on stock at the rate of $15.50 a month for twenty-six months, and the balance, namely, $972, represent interest and premiums for twenty-four months on the $5,400 loan. Mrs. Murray, it seems, was required to pay dues for two months preceding the date when she became a member, which accounts for her having paid dues for twenty-six months and interest and premiums for only twenty-four months. The monthly payment of dues, interest and premiums amounted to $56, and the last payment was made in December, 1900. Defendants thereupon made application to the association for a discharge of their mortgage, claiming that their understanding of its provisions entitled them to such discharge. The association refused to give such discharge and its officers thereupon explained to defendants the nature of their contract and the extent of their liability. The defendants thereupon accused the association of fraud and of having through its officers and agents induced the defendant Mary A. Murray to become a member and to procure the loan in question by means of false representations. It appears that the defendant Sheldon T. Murray called at the offices of the association several times thereafter, and had interviews with its officers respecting the transaction. And it further appears that defendants finally gave their promissory note to the association for $392 to cover seven defaulted payments of dues, interest and

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premiums. This note was not put in evidence, and the proof does not show clearly just when it was given or when it became due; but there is enough in the evidence to warrant a finding that the note became due about September 1, 1901. It was not paid and it does not appear that any proceedings were ever taken to enforce its collection. Defendants paid no dues, interest or premiums after the December payment of 1900 as stated above, but did give their note for seven of such payments, as we have just seen. On or about April 26, 1902, plaintiff was appointed receiver of the association. He brings this action to foreclose the mortgage executed to the association as described above, and claims that there is due and owing to the association from the defendants about $1,900. This sum is arrived at by charging defendants with $1,160 advanced to Mrs. Murray by the association and with interest thereon down to the entry of judgment; also with the $890.40 paid by the association and receiver as interest on the bank mortgage; and with $540 in premiums accruing from the date of the mortgage to the appointment of the receiver, and by crediting them with $972 of the $1,375 actually paid. The defense of usury and fraud is interposed and plaintiff's method of computing the amount due is rejected.

The transaction was not usurious. Concordia Savings & Aid Association v. Read, 93 N. Y. 474; Mutual Benefit, Loan & Building Co. v. Lynch, 54 App. Div. 559.

The fraud, if there was any (and I do not determine this point), was waived by defendants when they gave their note to the association for $392, with full knowledge of the real nature of the transaction into which they had entered.

The principal question remaining for determination is, with what sums shall defendants be charged in this action, and with what payments shall they be credited? Suppose the defendant Mary A. Murray, as a member of this association, holding sixty-two shares of its stock, had not borrowed any money from the association, and had not given her note to the association as above stated, but had paid monthly dues on her stock as required by the by-laws down to the time she defaulted, what would have been her status when the institution went into the hands of the receiver? Clearly she would have paid into the association $403 as dues on her stock, and she would have a credit on the books of the association for this item, together with her share in any

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profits made by the association, and against this total would be charged any fines legally imposed for defaults in monthly payments. Hence, if Mrs. Murray had not become a borrower of the association, but had simply paid dues on her stock for the same length of time that she actually did make payments of dues, interest and premiums, she would have been at the time the association went into the hands of the receiver a creditor of the association to the amount of $403 paid as dues on her stock, together with any profits which should be credited thereto, less any fines legally imposed and chargeable against said credits. And it follows that upon a final distribution by the receiver of the assets of the association, she would be entitled to receive her proper percentage, whatever that may prove to be, upon the above credits. And the extent of her loss would depend on the extent of the insolvency of the association. But Mrs. Murray was not only a member of the association, but a borrower therefrom. By becoming a borrower she did not cease to be a member. Her membership relation continued just the same as before. By becoming a borrower she simply assumed an additional liability. As a member she obligated herself to pay the association $15.50 a month dues on her stock. As a borrower she obligated herself to pay the further sum of $40.50 a month interest and premiums on her loan. Now it would seem reasonably plain that her relation to the association as a member and her relation to it as a borrower must be regarded as distinct. As a member she must stand with the other members, who borrowed nothing from the association, and must lose the same percentage on what she paid in as dues on her stock as they must lose. The fact that she became a borrower from the association should not give her an advantage over the other members who borrowed nothing, and she cannot now be heard to urge that what she paid in as dues must be offset against what she borrowed. To permit such an application of the funds of the association would be an outrage on the nonborrowing members. If, in the final adjustment of the association's affairs, either class should be given any advantage over the other, that advantage should go to the nonborrowing rather than to the borrowing members. And especially would this be true in a case like this, where it would seem that Mrs. Murray became a member of the association mainly for the purpose of enabling her to procure a larger loan on her real estate

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than she could obtain from other institutions or individuals engaged in the business of loaning money. But neither class is entitled to any advantage over the other — each must fare the same. And it follows that Mrs. Murray is not entitled to have the $403 which she paid in as dues offset against what she borrowed. That sum must remain in the hands of the receiver to the credit of Mrs. Murray, and upon the final distribution of the assets of the association by the receiver she will be entitled to receive the same dividend thereon as if she had never become a borrower.

Now as to her status as a borrower. The association having become insolvent is powerless to carry out its part of the contract, and the defendants are, therefore, absolved from a strict performance on their part. Under these circumstances substantial justice cannot better be done than by placing the parties on the plane of the ordinary borrower and lender of money. Defendants received in cash from the insolvent association $1,160. They agreed to pay the association, as a condition of this loan, interest thereon at the legal rate; also interest at the legal rate on the $4,240 loaned them by the Niagara County Savings Bank, the association to take care of the interest on this bank mortgage. They also agreed to pay premiums amounting to $13.50 per month. These premiums computed down to the time when the receiver was appointed amount to $540. Plaintiff now claims to be entitled to recover these several items consisting of principal, interest and premiums, amounting approximately to $2,872 (depending on the time to which interest is computed), less the $972 which defendants have paid as interest and premiums. That defendants are chargeable with the $1,160 advanced to them by the association, and with interest thereon from the date of the loan, and with $890.40 paid by the association and receiver as interest on the bank mortgage, seems perfectly plain. But I am unable to find any just or equitable principle upon which they can be charged with the $540 in premiums. No reason seems to be advanced why they should be so charged except that they agreed to pay it. This falls far short of a satisfactory reason under the circumstances existing in this case. There is no justice or equity back of such reason. What does this $540 represent in value received by the defendants that they should be charged with it? Absolutely nothing. They received $1,160 from the association,

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but they are being charged with that and with legal interest thereon. The association and receiver have paid $890 as interest on the bank mortgage, but the defendants are also charged with that. Furthermore, the $403 which Mrs. Murray paid to the association as dues on her stock must, as we have seen, remain in the receiver's hands, and she must accept such dividend thereon as the courts may eventually declare. Why, then, should defendants be charged further with this $540 in premiums? Can any reason be found for it other than the one stated, namely, that they agreed to pay it? I find none, and that reason, whatever potency it may have had at one time, is without any force now because the association cannot, by reason of insolvency, perform its part of the contract. If there was ever any consideration for this promise on the part of defendants to pay premiums it consisted in the promises and representations of the association, through its officers and literature, that the investment would be a profitable one to defendants financially, and now that the association is powerless to make good its promises and representations, the consideration has entirely failed and defendants cannot be held strictly to their agreement.

This agreement, in so far as defendants obligated themselves to pay these premiums, would seem to be unconscionable, and, as between individuals, or any other sort of a corporation, would have been usurious. And now that the association has become insolvent and cannot perform its part of such contract, those having its affairs in hand must be satisfied with such a recovery as will reimburse the association for all it has loaned or paid out for the benefit of defendants, with legal interest thereon. Such a recovery is manifestly equitable. It neither wrongs nor does injustice to either party to this controversy. But to charge defendants with this $540 in premiums, which represents nothing that the association has parted with for their benefit or otherwise, and which represents nothing of value received by them, would be anything but equitable, and cannot be sanctioned by a court of equity.

The note which defendants gave for $392 to cover seven defaulted payments represents $283.50 of interest and premiums on the loan and $108.50 dues on stock. In respect to the defaulted payments of interest, it has already been pointed out that defendants should be and are charged therewith in this action.

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And in respect to the defaulted premiums it has been shown that defendants should not be charged therewith. Hence the note, so far as it represents premiums and interest, namely, to the amount of $283.50, with interest on that sum from the date of the note, should be cancelled in the hands of the receiver. So far as it represents defaulted dues on stock it is for the receiver to determine whether he will seek to enforce it by a separate action or not. If collected, it would, for reasons already stated, have to be placed to the credit of defendant Mary A. Murray, as hereinbefore pointed out, respecting all other dues on stock paid by her.

Defendants are only entitled to be credited in this action with the $972 paid by them as interest and premiums on the loan. They cannot be credited in this action with the $403 paid as dues on stock for the reasons hereinbefore pointed out.

No steps appear to have been taken by the association looking to a forfeiture of the stock issued to the defendant Mary A. Murray, although the by-laws of the association seem to provide for such a proceeding. Her stock should not, therefore, be declared forfeited as demanded by the receiver, but must remain in her name to the end that she may receive any dividend thereon that may hereafter be declared.

This reasoning leads to the conclusion that defendants are chargeable in this action as follows: With amount advanced to them by the association, $1,160; with interest thereon at 6 per cent. from the date of loan to entry of judgment, to be computed; with interest paid by the association and receiver on the underlying mortgage, $890.40; and that they should be credited with the $972 paid by them as interest and premiums on the loan, and that plaintiff is entitled to judgment of foreclosure and sale for the difference.

Plaintiff should be allowed his disbursements in this action incurred and to be incurred, but no costs.

Judgment accordingly.

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Misc.] County Court, Onondaga County, March, 1903.

NATHAN J. PACKARD and MOSES PACKARD, Plaintiffs-Appellants, *v.* LOUIS WINDHOLZ, Defendant-Appellant.

(County Court, Onondaga County, March, 1903.)

Bills and notes — Accommodation indorser — Recovery where there is a material alteration.

The fact that the payee's indorsement of a promissory note was forged does not excuse one, who subsequently indorsed the note for accommodation of the maker, from liability to a subsequent indorsee and holder in due course who was compelled to take the note up before maturity and who had it protested for nonpayment.

A holder in due course of a negotiable instrument, who was not a party to an alteration made therein without the assent of all the parties liable thereon, may enforce payment thereof according to its original tenor.

APPEAL from a judgment of the Municipal Court of the city of Syracuse, for $57.72 damages and $15.37 costs, in favor of the plaintiffs.

S. Packard, for plaintiffs-appellants.

Hopkins & Betts, for defendant-appellant.

Ross, J. On July 31, 1902, one Adolph Treuman, made his promissory note for fifty-five dollars payable to the order of C. D. Eaton, payable at the First National Bank, Syracuse, at three months. The indorsement of the payee, C. D. Eaton, was a forgery. It was indorsed by the defendant, Louis Windholz, and by one L. Pakelnisky and by the plaintiffs, under the name of N. J. & M. Packard. This note was offered for sale by the maker to the plaintiffs, who were note brokers; the plaintiffs procured the indorsement of L. Pakelnisky; it was then taken by a messenger boy to the New York State Banking Company, a bank at that time doing business in Syracuse; the Syracuse Banking Company advanced the money upon the note, which money was brought to the plaintiffs' office by the messenger boy, and was handed to Treuman, the maker, less, I assume, certain fees. Subsequently and before the maturity of the note the New York

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State Banking Company failed or ceased to do business; the plaintiffs then took up the note and upon its maturity the same was duly presented at the place where it was payable and payment demanded, and was protested for nonpayment. Thereupon the plaintiffs brought this action.

The facts in reference to the second note of $120 were the same, except that the date was August 14, 1902, and the amount $120 was an alteration from $20, the original amount of the note. No claim was made upon the trial that the plaintiffs had any knowledge of these forgeries. The learned municipal court judge before whom this action was tried rendered judgment for the plaintiffs for the amount of the $55 note only. And from this judgment both parties appeal.

The plaintiffs knew that the defendant must be an accommodation indorser because of the fact that the notes were in the hands of the maker. Susquehanna Valley Bank v. Loomis, 85 N. Y. 207, 212. I think, however, that the plaintiffs are entitled to recover the amount of the fifty-five dollar note and the original amount, twenty dollars, of the other note. That the New York State Banking Company could recover will be admitted by every one. And it would seem that the Banking Company could transfer an equally good title to a purchaser in good faith for a valuable consideration before maturity. It could pass a good title by gift even to the plaintiffs, and it can hardly be that the plaintiffs are in a worse position, having paid money to take up the note upon which they were liable, than they would be in had the State Banking Company given them the notes. I will, however, assume that the plaintiffs gained no advantage by the transfer to the State Banking Company, and that they are in the same position as if they had paid the money to the maker and held the notes, duly protesting the same. A single word as to the difference between the liability of an indorser in due course for value, a vendor of negotiable paper, and an accommodation indorser. The contract of the latter is to pay his indorsee or any subsequent holder of the note, if the same is duly presented and due notice of dishonor given. In other words, his contract is an express contract of indorsement. Susquehanna Valley Bank v. Loomis, 85 N. Y. 207. On page 210 the following language of the court appears: "What then was his engagement? As indorser it was in general terms to pay the draft to any holder

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for value whose title was derived through the payee, provided it was duly presented to the drawee, payment refused by it and due notice of nonpayment given to him. (Hall v. Newcomb, 7 Hill, 416; Spies v. Gilmore, 1 Comst. 321.)" In that case the instrument in question was not protested, and it was held that the defendant, an accommodation indorser, was excused for that reason. The words "whose title was derived through the payee" quoted above have given me considerable trouble; but the only question involved in that case was the question of the liability of an accommodation indorser upon failure to protest. The cases cited by the learned court in immediate connection with the phrase above used were cases in which the question of the effect of a failure to protest was the point in controversy. The words "through the payee" should be "through his indorsee." The genuineness of the signature of the payee has nothing to do with the contract of the defendant. His contract is not to pay to the payee or order but to his indorsee or order.

The liability of an indorsee who is also a transferrer of the bill, in other words, a vendor, and who receives value for the same, arises not only upon the express contract of indorsement but also upon an implied and extrinsic contract of genuineness. See article by Professor James Barr Ames on Negotiable Instruments Law, 14 Harvard Law Review, at p. 251. This implied contract Professor Ames compares with the implied contract of a vendor of a chattel. A liability arises upon the implied contract of genuineness immediately upon the transfer of the instrument. In other words, if violated, it is not necessary to wait for the maturity of the bill. See Turnbull v. Bowyer, 40 N. Y. 456. No such liability exists or is sought to be enforced in this case. Dawson v. Prince, 2 DeG. & J. 41; 1 Ames Cas. Bills & N. 724; Beckwith v. Webber, 78 Mich. 390.

The plaintiffs are entitled to recover the original amount of the altered note, twenty dollars. Negotiable Instruments Law, L. 1897, ch. 612, § 205.

Judgment reversed, and a new trial in Municipal Court ordered at a time to be fixed in the judgment. Costs for plaintiffs-appellants to abide the event of the action, which may be included in any subsequent judgment in the Municipal Court.

Judgment reversed and new trial ordered, with costs to plaintiffs-appellants, to abide event.

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EDWARD JOHNSON, Plaintiff, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant.

(Supreme Court, Albany Special Term, March, 1903.)

Verdict — Against evidence.

Where the overwhelming weight of evidence in an action brought against a railroad corporation by a person, not a passenger, for damages for having been kicked off the platform of a moving car of the corporation, as alleged, by an employee thereof, is opposed to the plaintiff's version of the affair, a verdict in his favor must be set aside as resulting from passion, prejudice or a misapprehension of the evidence.

MOTION to set aside verdict for $4,000 rendered in favor of the plaintiff, and against the defendant, at the March trial term of the Supreme Court, Albany county.

Joseph A. Murphy (Peter A. Delaney, of counsel), for plaintiff.

William P. Rudd, for defendant.

HERRICK, J. The plaintiff claims that he got upon a train of the defendant, leaving New York city, placing himself upon the front platform of the baggage-car, that being the third car back from the engine. That he rode in that place until he reached the city of Rensselaer, opposite Albany, at or about one-forty o'clock in the morning. That as the train approached the bridge it slowed up, and a trainman discovering him on the platform of the car kicked him off; that he fell with one of his arms under the car, which was so crushed that its amputation was necessary.

Upon this trial he identified a trainman on said train, named Shultes, as the man who kicked him off. Shultes denies either having seen or kicked the plaintiff. The issue between them is thus sharply presented, and to determine the truth a short analysis of the history of this case, and of the evidence given, becomes necessary.

The case has been once before tried and a verdict rendered

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in favor of the plaintiff, and a judgment entered thereon, which was reversed by the Court of Appeals and the case sent back for a new trial.

The accident happened on the night of March 23, 1900.

Upon the former trial the plaintiff failed to identify Shultes as the man who kicked him, although Shultes was present in court, and testified as a witness upon the trial.

Upon the former trial the plaintiff testified that the man who kicked him off had a sandy mustache and sandy hair; Shultes, as a matter of fact, has dark brown hair, almost black, and by some would be called black, and a dark brown or black mustache somewhat sprinkled with grey. Upon the plaintiff's attention being called to that fact, he explained that that color was what he called sandy.

He states that the reason that he was unable to identify the man on the former trial was because he did not have on his railroad uniform, whereas the man who kicked him off had on the uniform of a trainman.

Shortly before the trial now under review, he went to the depot of the defendant in Albany, for the purpose of seeing if he could recognize the man who kicked him when he saw him with his uniform on, and when he saw Shultes with his uniform on, he says he identified him.

When the defendant came to present its side of the case Shultes was produced with a uniform on, such as the plaintiff described as having been worn by the man who kicked him, and personally I could not see that it made any difference in the appearance of the man's face or head that would at all embarrass one in identifying him.

This case was reversed in the Court of Appeals, as it appears, because upon the former trial the evidence failed to show that the man who kicked the plaintiff off the car was one of the servants or employees of the defendant.

The plaintiff went to defendant's depot to see if he could identify Shultes as the man who kicked him off, after he had heard of the decision of the Court of Appeals, and upon his cross-examination he was asked and answered the following questions: "Q. You understood, didn't you, that the court in defeating you in this law suit, setting aside your judgment had said that it was necessary for you to pick out the man, didn't you? A.

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Sir? Q. You understood that when the court set aside your judgment that you got on the other trial, it said that it would be necessary for you to pick out the man that kicked you off, didn't you? A. Yes, sir."

The witness, Shultes, was sworn upon the former trial, and in the absence of any claim to the contrary, it must be assumed that he swore then as he does now, and from his testimony it appears that he was stationed on the rear car of the train, that he was the only official or employee of the company on that car; that the other trainman was in the forward passenger coach in company with the conductor. The plaintiff knew that, and he apparently knew that it was necessary to show that some one on the train, coming from the rear, was the one who kicked him from it. So much for the identification, and the reasons for it.

The plaintiff says that the train slowed up as it approached the bridge, that when it slowed up "A brakeman dressed in a uniform suit, with a railroad lantern went running ahead, run ahead of me and on his way back, he didn't stay, well, there for a minute, just as quick as he could get back he saw me setting in the doorway and he jumped on where I was and he says 'what are you doing on here, get off here,' so I didn't get up, I didn't have time to get up, he just give me a kick and I went right over and fell on the track and this arm went right under the train."

He says he was kicked off and fell on the left side of the track, and furthermore indicated from his position in the witness chair upon which side of the track he fell, which was, as a matter of fact, between the track and the Hudson river.

The night watchman who found him, the conductor and brakeman of a near by freight train, to whom the night watchman communicated the fact that the plaintiff was there and injured, and who thereupon removed him, all unite in saying that he was on the right-hand or easterly side when found.

It will be observed that he testified that when the train slowed up the brakeman came running up, ran ahead of the car where the plaintiff was, then came back, the train being still in motion. The train appears to have been composed of ten cars, two express cars, one baggage, one smoker, one coach, and five Pullman sleeping cars.

Shultes then, if he was the man who kicked plaintiff off, would have had to pass four cars at least before reaching the one upon

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which the plaintiff was, pass ahead of that, then shortly afterwards come back, and the train must have been going slow enough to enable him to do this. The locomotive engineer, his fireman, the conductor, the baggageman and both trainmen, all men in the employ of the railroad for a number of years, testify in relation to the speed of the train at this point, and none of them make it less than fifteen miles an hour. Of course even men who are accustomed to traveling and the movement of trains are liable to err in regard to speed, and there seems to be almost a mathematical demonstration of that fact in this case. There are three towers in the yard of the defendant company in the city of Rensselaer through which its trains pass to reach the bridge crossing the Hudson river. These towers are known as ninety-seven, ninety-eight and ninety-nine. The towerman of ninety-eight was produced as a witness, and it seems that amongst other things it is his duty to keep a record of passing trains; that record, made at the time this train passed, was produced by him in court, and from his testimony it appears that there is an electrical device by which when a train passes ninety-seven he is notified of that fact and immediately notes it down, when it passes his own tower he notes that fact, and when it passes ninety-nine an electrical device of the same character notifies him of that fact. From the record of the train upon which this accident happened, it appears that the train passed tower ninety-eight at one thirty-eight o'clock, that it passed tower ninety-nine at one thirty-nine o'clock, making the time between the two towers, one minute.

From the testimony of the civil engineer who was produced it appears that the distance between the towers ninety-eight and ninety-nine is 3,075 feet, in other words, the train passed over a distance of 3,075 feet in a minute, or at the rate of thirty-four and nine-tenths miles an hour.

It is an admitted fact in the case that the plaintiff did not move, or at least did not move for any considerable number of feet, from the spot where he fell, and when he was found he was about midway between towers ninety-eight and ninety-nine.

If the train was going at that rate of speed, or even at the minimum rate testified to by any of the employees of the defendant, it would have been impossible for a trainman to leave any part of the train and run ahead, that is to say to make a

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greater speed than that at which the train was going, then return and get on the car in the manner described by the plaintiff.

All the employees of the defendant upon the train were sworn as witnesses, the engineer and his fireman, the baggageman, the expressman, the conductor and both trainmen, and they all unite in saying that the train did not slow up at the point where the plaintiff was found, in the manner or to the extent described by him; that they did not know of his being upon the train, did not see him or hear him, and they did not know of the injury to him until some time after the train had reached the depot in Albany, and some of them had returned to the city of Rensselaer where they resided, then hearing for the first time that the plaintiff had been injured; they all unite in saying, and each of them says, that he did not get off the train while it was moving through the city of Rensselaer, and the trainman Shultes says that he did not get off, as before stated, and did not see or kick the plaintiff; and the testimony of these men, as pointed out by the Court of Appeals in this case in 173 N. Y. 83, is not to be rejected because they are employees of the defendant.

It is true that the witness Shultes is an interested witness, because he is the one identified as the one having committed this wanton assault upon the plaintiff, and he may be said to be interested to the same extent that the plaintiff is. But the plaintiff stands alone and uncorroborated in his account of the transaction, while Shultes is corroborated by an overwhelming weight of evidence in the case.

We are not to determine how the accident happened, but whether it happened in the manner shown by the plaintiff, and upon that this case stands or falls.

In this case the overwhelming weight of evidence is opposed to the claim of the plaintiff, and it seems manifest that the verdict rendered could only be the result of passion or prejudice, or a clear misapprehension of the evidence.

The motion to set aside the verdict and for a new trial is granted, but granted however upon the payment of the plaintiff's costs and disbursements of the trial by the defendant, within twenty days after the entry of this order, otherwise the motion is denied.

Ordered accordingly.

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Matter of the Application of JOSEPH L. O'HARA for a Special Town Meeting in the Town of Willsborough, Essex County, for a Resubmission to the Electors of said Town of the Local Option Questions Provided by Section 15 of the Liquor Tax Law.

(Supreme Court, Franklin Special Term, March, 1903.)

Liquor Tax Law — Resubmission of local option questions refused.

The neglect of a town clerk to publish in the proper county newspaper, for five days before a town election, a notice that the local option questions would be then submitted to the voters is not a sufficient reason for setting aside the election and ordering a resubmission of the questions where there is proof that the clerk's neglect has caused no prejudice and a full vote has been had.

APPLICATION by petitioner for a special town meeting, asking that the four propositions under the Liquor Tax Law be resubmitted to the electors of said town.

Stokes & Owen, for application.

W. G. Van Loon, for excise department.

F. B. Wicks, for town of Willsborough.

KELLOGG, J. M., J. This is an application by Joseph L. O'Hara, who has a druggist's license expiring May first, supported by the petition of forty-one qualified electors of the town of Willsborough, asking that the four propositions under the Liquor Tax Law be resubmitted to the electors of said town on the ground that at the election held March 3, 1903, the vote upon these questions was improperly had for the reason that the town clerk did not publish in a county newspaper for five days before election a notice that said questions were to be submitted to the voters. Under section 16 of the Liquor Tax Law if these propositions have not been properly submitted at any election, this court may direct such resubmission, "sufficient reason being shown therefor." It is conceded that the petition was duly filed with the town clerk and the notices duly posted, and in fact the

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proof shows that instead of posting the notices in four public places in the town, as required by the Liquor Tax Law, six such notices were posted. And the affidavit of the town clerk shows that there was no newspaper published in the town and he did not know that it was necessary to publish such notice in a county paper. It appears from the affidavits that at the last general election in said town 343 electors voted. That at the biennial election in question the largest number of votes cast for any officer or any proposition was 348, and the largest number of ballots upon any excise proposition was 347, showing that every elector except one who voted upon any question voted upon some of these propositions. The evidence shows a thorough house-to-house canvass of the town by those favoring and opposing license; that all the clergymen of the town preached upon the subject from the pulpits; that different meetings were held in the town, and the matter was frequently referred to in the news items in the county papers, and that the approaching ballot was a subject of general conversation, remark and agitation in the town for several weeks before the town meeting. It appears that at the town meeting in 1898 the largest number of votes cast for any town officer was 288. At the town meeting in 1899 the largest number of votes for any town officer was 223, and at the biennial meeting in 1901 the greatest number of votes was 392. In 1897 the total vote upon the local option question was 261; in 1899, 207, and in 1901, 293. The affidavits do not tend to show that any citizen of the town who might have desired to vote upon either of these propositions failed to do so because of want of notice of the fact that such vote was to be taken. At this biennial election the majorities against the propositions were on the first 82, the second 20, the third 2, the fourth 16. Undoubtedly the knowledge acquired by the voters of the town that these propositions were to be submitted was much more general than could have arisen from the mere posting and the publication of the notices as required by law, and a full and fair expression of the people of the town unquestionably has been had. Was the publishing of this notice in a county paper for five days jurisdictional, and, therefore, a condition precedent to the holding of a valid election? If it were conceded that every elector of the town had in fact, notice of the election, or, in fact, voted at the election, would the failure to publish in the county paper render the election

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absolutely void? Must this court, upon the petition of a party who, concededly, was an active participant in the election, and who raised no question as to its validity until after he was defeated at the polls, set aside this election upon a mere technicality? The applicant bases this motion upon a petition executed by forty-one electors, which is intended to be filed with the order of the court for a resubmission of the question, if such order is granted. But the affidavits of fourteen of these petitioners are read saying they do not desire such resubmission, and do not want to contest the legality of the election upon the excise propositions.

It would seem that two questions are before the court:

First. Does this defect make the election absolutely void?

Second. The first submission not being properly made is that "sufficient reason shown" why this court must order a new election when it is evident that all the voters of the town substantially had notice of the election, most of them voted, and it is probable that as full and free an expression would not be had at a new election as has already been had? We answer both of these questions in the negative. It seems that if the matter rests at all in the discretion of the court, as to whether a new election should be ordered, that such discretion should be exercised against the application. It is not in the interest of the town that it should again be burdened with the expense of another election, or that it should again be agitated by this question, which has apparently been fairly settled. There is no case which is a controlling authority upon the question first suggested whether this election is absolutely void by reason of the failure to publish the notice for five days in the county paper.

In Matter of O'Hara, 63 App. Div. 512, the only question before the court was whether a mandamus was the proper proceeding if the election was invalid. It is, therefore, no authority here.

In Matter of Eggleston, 51 App. Div. 38, the petition immediately upon being filed with the town clerk was removed and filed with the county clerk and no notices whatever were published or posted. The opinion states that only two questions are before the court: *First*, whether the petition should be filed with the town clerk. *Second*, must notice be given? It held affirmatively upon both these questions, that although neither the Liquor Tax Law nor the Town Law mentioned the giving of notice, still that under the general law such notice was necessary.

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In People ex rel. Crane v. Chandler, 41 App. Div. 178, the notice was given by the town clerk only four days before the town meeting, but it appeared that the electors were fully informed that the propositions were to be submitted, and the election was sustained, the court citing People ex rel. Hirsh v. Wood, 148 N. Y. 142, holding that the spirit and not the strict letter of the law was to be observed. In that case the Appellate Division comes nearer passing upon the questions in this case than does any other decision to which our attention has been called.

At Special Term the decisions are conflicting and varied. In Matter of Powers, 34 Misc. Rep. 636, where there was neither publication nor posting, it was held that the election was void. It does not appear just how general notice was given in that case.

In Matter of Rowley, 34 Misc. Rep. 662, there was no publication or posting by the town clerk, but various meetings were held, sample ballots mailed to every voter and a large vote had. The court refused to resubmit the questions.

In Matter of Sullivan, 34 Misc. Rep. 598, there was no official notice or publication. Notices were mailed to every elector, but they were addressed to the voters of the town of Peterborough, referring to the election there, and not to the town of Moreau in question. A resubmission was ordered.

In Matter of France, 36 Misc. Rep. 693, there was no publication, notices were posted for only five days, but the vote equalled that at the last presidential election and nearly all the electors voted. A resubmission was denied.

It seems, therefore, that this court is at liberty and required to make its own decision, treating this as a question that has not been decisively settled by the courts. It does not seem that an election should be declared void because a ministerial officer has neglected to perform a duty as to publishing a notice, when it is beyond question that the failure to perform that duty has not prejudiced any one or any cause.

Section 16 of the Liquor Tax Law provides that in order to ascertain the will of the electors of the town the petition must be filed with the town clerk. The filing of this petition is a condition precedent to a valid election, and upon its being filed the electors of the town have the legal right to vote upon the propositions and the error of a town officer cannot defeat such right. That the statute makes the filing of the petition the con-

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dition precedent, and the only one, appears from the subsequent provisions of that section, which allow a resubmission where the first one is improper for any reason except the filing of the petition. In order that the vote may be full and fair certain duties are imposed upon the town clerk of giving notice, and these duties are directory rather than mandatory, and I think the provisions of section 16 as to a resubmission show clearly that such was the intention of the Legislature. It provides that if, for any reason, except the want of petition, the questions have not been properly submitted, they shall be resubmitted, but only after the court or a judge, upon due notice, determines that sufficient reason has been shown for such resubmission. I construe this provision as meaning that if a submission is improperly had there shall be a resubmission if the court determines that there is sufficient reason therefor. "It is a familiar rule that a construction of a statute is to be avoided which is liable to produce a public mischief or to promote injustice. Language, however strong, must yield to what appears to be the intention, and that is to be found, not in the words of the particular section alone, but by comparing it with other parts or provisions of the general scheme of which it is a part." Hayden v. Pierce, 144 N. Y. 512, 516.

"Must" or "shall" in a statute is not always imperative but may be consistent with an exercise of discretion. Matter of Thurber, 162 N. Y. 242, 252. The court is not called upon to act in any case except where there has been an improper submission and there it "may," sufficient reason being shown, order a resubmission. Clearly the statute might have provided that in case of an improper submission the court must order a resubmission. But it does not say so. It says the court "may" order a resubmission where the first submission was improperly made and the court finds there is sufficient reason for a resubmission. It does not, therefore, follow that every improper submission (except the want of a petition) requires the court to grant this order for a resubmission. The theory of popular government is the rule of the majority, and the law wisely provides that notice must be given of elections and submission of questions to the electors so that all may have a fair voice. In any case where the statutory notices are not given the election is irregular and should be set aside unless it fairly appears that no injury arose from such irregularity. But where an actual notice was in fact

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given to all electors, they cannot be prejudiced from the fact that the formal legal notice was not given. It ought to be sufficient to assume *prima facie* that an irregularity in giving notice is prejudicial and makes a proper cause for a resubmission; but when it affirmatively appears that the public has not suffered by such irregularity, and that full notice was in fact given, the end designed to be accomplished by the statutory notice is reached, and a court vested with discretion will not follow the strict letter of the law in utter disregard of its spirit and intent and for a technicality sacrifice the substance. We have seen that the court is vested with discretion and is called upon to determine in each particular case under this section whether sufficient reason for resubmission has been shown. We find no such reason in this case and the motion is, therefore, denied, with ten dollars costs.

Motion denied, with ten dollars costs.

EDWARD JONES, Plaintiff, *v.* LAURA E. JONES, Defendant.

(Supreme Court, Fulton Special Term, March, 1903.)

Fraud — Promise which the promisor never intended to perform — Husband and wife.

A promise to do a future act, intended to induce and inducing the promisee to part with his property, if made by the promisor with no intention of performing, constitutes actionable fraud.

A complaint, by a man living apart from his wife, in which he alleges that she, in order to induce him to convey to her his farm, falsely promised to return to him and cohabit with him during the remainder of his life, that he conveyed in reliance upon the promise, that she made it to defraud him of his farm, and that she did not keep the promise or intend to keep it when she made it, states a good cause of action for setting aside the conveyance to her.

ACTION to set aside certain deeds by which plaintiff conveyed to his wife, the defendant, his farm in the county of Warren. The parties were living apart and the plaintiff alleges that in order to induce him to make the conveyances, the defendant falsely promised to return and cohabit with him during the remainder of his life; and that he conveyed the property relying upon the

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good faith of such promise. He further alleges that such promise was not made in good faith but with the intent to defraud him of the property; and that the defendant at the time of making the promise did not intend to keep the same; but shortly thereafter left him to live with another man, and still refuses to return. The defendant demurs.

Charles P. Coyle, for plaintiff.

Harry T. Dayton (Albert H. Clark, of counsel), for defendant.

SPENCER, J. The defendant has attempted by this transaction to make merchandise of her marital relations. According to the fundamental principles of that relation, it is the right of the husband to fix, and his duty to maintain, the matrimonial domicile; and it is the right of the wife to be supported by her husband therein, and her duty to give to her husband the benefit of her society and to render such service in the care of the home as shall be in keeping with their station in life; and any agreement which attempts to alter these rights and duties or to rest them upon any other foundation is illegal and void.

The encouragement of marriage has always been a matter of deep public concern, and it has come to be the universal rule that all contracts in restraint thereof, or for the procurement or facilitating of divorce, are against public policy. An exception, however, exists where the parties have separated and the husband has made provision by deed for the separate support of the wife. In those cases contracts to convey property have been upheld where the same were fair and equitable. But I do not think the conveyances here are within that exception. They were not made for the wife's support and the only consideration therefor is the agreement on the part of the wife to cohabit with the husband, a duty which she assumed by virtue of her marriage. The law will not uphold, nor the courts tolerate, such agreements.

But the ground for relief alleged by the plaintiff in his complaint is that the conveyances in question are tainted with fraud, in that he was induced to execute the same by reason of a false promise made to him by the defendant and which promise she at the time intended not to perform. We are thus brought face to face with the question, whether a promise so made, with intention not to perform and by which a party has been led to part

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with his property, will amount to fraud and afford ground for annulling the conveyance? The question is not free from doubt. I am referred to no decision in this State in which it has been discussed and none has fallen under my observation. There are a number of decisions in other States, but they are not harmonious. Their line of cleavage seems to spring out of the question whether a purchase of goods by an insolvent with the preconceived intention not to pay constitutes fraud. Wherever that doctrine has been held, it seems to have been followed to its logical conclusion to the effect that a promise made by one and acted upon by another, accompanied by an intention of the promisor not to perform, is such a false representation as to constitute fraud.

The Pennsylvania courts are at variance with both propositions. Thus in Backentoss v. Speicher, 31 Penn. St. 324–327, it is said: "Where there is a sale of goods and delivery of possession, even though the buyer intends, at the time, not to pay for them, and conceals his insolvency from the vendor, it is not a cheat that will avoid the sale. There must be artifice practiced, such as was intended and fitted to deceive, to constitute a cheat. This is not the doctrine, I know, of the New York courts. There it is held, that a purchase of goods, with the intention not to pay for them, does not divest the vendor's title — a rule which has not been permitted to displace ours."

The court in making this decision relied upon its former decision in Smith v. Smith, 21 Penn. St. 367–370, where it was said: "An intention not to pay is dishonest, but it is not fraudulent. It is no more fraudulent to have such an intention at the time of the purchase than at the time when payment ought to be made."

I think the argument is elliptical upon which these decisions rest. It overlooks the factor that the promise which deceived the seller and became the inducing cause of the sale was infected by a corrupt intention, which made the transaction dishonest on the part of the purchaser; whereas, the corrupt intention subsequently conceived in no way entered into the transaction and does not relate back to and make dishonest that which was honest.

The principle involved seems to be more clearly apprehended in two Connecticut cases, namely, Dowd v. Tucker, 41 Conn. 197–203; and Ayres v. French, id. 142, where in the latter case.

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the court say: "It is the dishonesty in making the false promises in furtherance of his scheme of fraud that is the basis of the action. * * * It would seem that if a man is guilty of fraud in the purchase of goods when he has a secret intention not to pay for them, much more is he guilty of fraud if, after he devises a scheme for getting possession of the property of another without buying it and appropriating it to his own use, he goes deliberately at work to carry his scheme into execution by making promises with the intention at the time not to fulfill them. * * * Where lies the fraud in buying goods with an intention not to pay for them? It lies in the fact that the fraudulent purchaser gives the seller to understand that his intention is to pay for them. His deceit, therefore, is in his statement with regard to his intention."

The courts of New Hampshire are in harmony with this view and apply it to a promise made to induce a sale. Thus in Goodwin v. Horne, 60 N. H. 485, the court say: "Ordinarily false promises are not fraudulent nor evidence of fraud, and only false representations of past or existing facts are actionable or can be made the ground of defense. But when a promise is made with no intention of performance and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end and the victim has a remedy by action or defense."

This doctrine is clearly announced and ably supported in the case of Chicago T. & M. C. R. Co. v. Titterington, 84 Tex. 218, where the court say: "Ordinarily promises to perform some act, although made by one party as a representation to induce the other to enter into a contract, will not amount to fraud in legal acceptation, although subsequently and without excuse broken. But our courts have recognized an exception, expressed with reference to this case, as follows: 'If the railway company at the time it made the representations and promises did so with the design of cheating and defrauding the plaintiffs and had no intention at the time of performing the promises, but used them merely as false pretenses to induce the plaintiffs to execute the deed, and, if its conduct did have this effect, then such declaration coupled with its subsequent refusal to perform the promises would amount to such actual fraud as would authorize the plaintiffs to have the contract rescinded and the land restored to them.'"

I am, therefore, of the opinion that the weight of authority

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is upon the side of the plaintiff's contention and that the defendant's promise, accompanied by an intention on her part not to perform, constituted fraud, he having parted with his property in reliance thereon. While none of the courts of this State has, so far as I know, adopted the proposition here stated, nevertheless, the Court of Appeals, by a number of decisions on cognate questions, has indicated pretty clearly that such will be its decision in an appropriate case.

Thus in Hennequin v. Naylor, 24 N. Y. 139, it was held that the omission of a purchaser of goods for credit to disclose his insolvency is not necessarily fraudulent, yet if the purchase be made with a preconceived design not to pay it is fraud; and in Devoe v. Brandt, 53 N. Y. 462, it was held that fraud in the purchase of goods may be based, as well upon a suppression of the truth, as upon false representations; and in Hotchkin v. Third Nat. Bank, 127 N. Y. 329–338, the court say, per Brown, J.: "If a purchaser who is insolvent conceals that fact from the vendor for the purpose of defrauding him, and thus obtains goods without intending to pay for them, the title of the property is not changed, and it may be reclaimed by the vendor." All these cases go upon the theory of the illegal intent of the purchaser at the time of the transaction.

Wherever the courts in defining fraud have gone to the extent thus reached by our Court of Appeals, they have, I think, followed the doctrine to its legitimate and necessary conclusion, viz.: That a promise made to do an act in the future to induce another to part with his property, and which promise does in fact accomplish its purpose, accompanied by a present intention by the promisor not to perform, constitutes actionable fraud. In the purchase of goods without intending to pay, the fraud does not arise from the fact that the promise is not kept, but from the fact that it was made for the purpose of defrauding, and with an intention not to perform; and that the other party is led to believe that it is made for ordinary business purposes, whereas, in fact, it is made for the sole purpose of defrauding.

In the case at bar, the plaintiff was, by the defendant's promise, deceived into believing that the defendant entertained kindly feelings, or at least good will towards himself as her husband, whereas, in fact her state of mind was quite the reverse, she having no intention of performing her marital duties, her mind being filled

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with a treacherous and evil design. A person should not be at liberty to misrepresent the condition of his mind in order to defraud another of his property, any more than he should be permitted to misrepresent the condition of his estate for the same purpose.

A further question is raised to the effect that Dennis Pratt, the person through whom the title to the premises passed on its way to the defendant, is a necessary party. I do not concur in this contention. Dennis Pratt is not charged with being a party to the fraudulent scheme. He was simply the conduit through which the title passed from the plaintiff to the defendant. He has no interest in the controversy or in the property. No relief is asked as against him. The fact that the prayer of the complaint asks to set aside the deed from the plaintiff to Pratt, as well as the deed from Pratt to the defendant, is of no consequence, as any appropriate relief under the prayer may be granted; and whether that relief be to set aside the deeds or to declare them null and void is immaterial.

The demurrer is, therefore, overruled with costs, with leave to answer over on usual terms.

Demurrer overruled, with costs, with leave to answer over on usual terms.

HERBERT HAZARD, Respondent, *v.* CAROLINE POTTS et al., Appellants.

(Supreme Court, Appellate Term, March, 1903.)

Husband and wife — Married woman not liable for medical services rendered the family.

A married woman is not liable for medical services rendered to her husband and his family unless in the first instance she pledged her personal credit to pay for the services.

APPEAL by the defendants from a judgment of the Municipal Court of the city of New York, fourth district, borough of Manhattan, rendered in favor of the plaintiff upon a trial had before the court without a jury.

Phillips & Samuels, for appellants.

F. Herbert Wadsworth, for respondent.

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GIEGERICH, J. The action is to recover the sum of $112 for services rendered by the plaintiff's assignor, Emory M. Wadsworth, M. D., and Stuart H. Benton, as physicians. The pleadings were oral. The defendant is a married woman having a husband and two children, and although her husband was joined with her as a party defendant, she alone defended the action. The answer was a general denial, coverture and that the plaintiff was not the real party in interest.

At the beginning of the trial, the defendants' counsel admitted "that the plaintiff's assignors rendered for the defendant Robert Potts and his family medical services of the reasonable value of $112, no part of which had been paid, and that they were rendered to the defendant Robert Potts and his family," and the only question litigated was whether the defendant had incurred a personal liability for the services in suit. The justice resolved the conflict of evidence in favor of the plaintiff for the full amount claimed, and the defendant appealed to this court.

The sole question in the case is whether the defendant is liable for the services rendered. The liability for such services is presumptively and primarily upon the husband, unless the wife, by express agreement, charged herself personally with the same. Webber v. Spannhake, 2 Redf. 258; Estate of Mrs. Shipman, 23 Abb. N. C. 101; Hallock v. Bacon, 45 N. Y. St. Repr. 484; Matter of Smith, 18 Misc. Rep. 141; Lindholm v. Kane, 92 Hun, 369. Therefore, in order to charge the defendant with liability it was incumbent upon the plaintiff to prove that she undertook liability and that such services were rendered upon her credit.

The evidence shows that the services were rendered upon the request of different members of the defendant's family; but even if the defendant had requested the rendition of any of them, such request would not have raised any implied promise on her part to pay for the same (Crane v. Baudouine, 55 N. Y. 256; Estate of Mrs. Shipman, *supra;* Matter of Smith, *supra*); but on the contrary since all the services were necessary for the defendant's family and the plaintiff's assignors knew it, the presumption would be that the defendant had made such request as agent of her husband. Lindholm v. Kane, *supra;* Bradt v. Shull, 46 App. Div. 347.

The record is barren of any evidence tending to show that the services were rendered upon the personal credit of the defend-

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ant, or that the plaintiff's assignors when they rendered them told the defendant that they would look to her for payment of the same.

Under these circumstances no recovery against the defendant can be maintained, unless some effect can be given to the testimony adduced in plaintiff's behalf that, after all the services had been rendered, the defendant made two payments on account and thereafter asked for a bill and said she would probably pay the claim in installments; subsequently the defendant wrote one of the plaintiff's assignors that "as soon as I am able to go to New York, I will call," and that she meant by that letter that she wanted to go there for the purpose of borrowing money from a friend; thereafter, viz., in the month of November, 1902, Dr. Wadsworth, one of the plaintiff's assignors, and his brother called at the defendant's residence where they at first met the husband, who excused himself, by saying that his wife would be in presently and talk with them, and that the defendant then appeared and stated that they wanted to pay the bill if given time to do so, and that she was willing to give a note, but that she could not speak for her husband, and that a day or two thereafter the defendant told one Miss Ada M. McKenzie that she would pay the bill.

The defendant denied that she promised to pay such bill, but even if she did, such promise would not, for obvious reasons, enable the plaintiff to maintain an action thereon, but might, at most, be some evidence of an agreement at the outset to pay, if nothing appeared to the contrary. Lindholm v. Kane, *supra*. Such question, however, need not be considered, since it appears from the evidence that the plaintiff's assignors did not have any conversation with the defendant about payment for his services until after they had been rendered.

There was, therefore, no evidence in the case from which it might be legitimately inferred that the services were rendered upon the agreement of the defendant to be personally liable for them. On the contrary the bills rendered by the plaintiff's assignors were made out to the husband, which fact strongly tends to show that the services were rendered upon his credit alone. Hence in the absence of an original agreement to be personally liable, the defendant's alleged subsequent promise to pay for them, even if established, must be presumed to have been made in her relation of wife, and in the exercise of her implied agency to obtain medical attendance for the family.

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There is no evidence that the defendant was engaged in any business when the services were rendered, or that she bound her separate estate, if she had any, with the payment thereof, and, therefore, in the absence of proof showing an agreement on her part to be personally liable, the recovery by the plaintiff against her was not warranted.

It results from these views that the judgment should be reversed and a new trial ordered, with costs to the appellants to abide the event.

FREEDMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and new trial ordered, with costs to appellants to abide event.

THE PEOPLE ex rel. LUCIUS H. BEERS, as Trustee for LAURA ASTOR DELANO, Relator, *v.* THOMAS L. FEITNER et al., Commissioners of Taxes and Assessments of the City of New York, Respondents.

(Supreme Court, New York Special Term, March, 1903.)

Tax — Residence.

A person, taxed as trustee in New York city and county for personalty in 1901, and who claimed a residence in the town of Southampton, Suffolk Co., was physically present in that town on July 1, 1900, remained there until Oct. 1, 1900, then returned to Manhattan, New York city, and sojourned there with his mother, voted there in Nov. 1900, and was still there on the second Monday of Jan. 1901, when the "Annual Record" was opened for public inspection.

Held, that he was properly taxed as resident in New York city and county in 1901.

CERTIORARI to review the proceedings of the commissioners of taxes in assessing the personal property of relator.

Lord, Day & Lord (Henry De Forest Baldwin, of counsel), for relator.

George L. Rives, Corporation Counsel (A. T. Campbell, Jr., of counsel), for respondents.

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CLARKE, J. This certiorari is brought pursuant to the Tax Law (Laws of 1896, chap. 908) to review the proceedings of the commissioners of taxes in assessing the personal property of the relator, as trustee, for the year 1901 at the sum of $50,000. The relator filed a verified application for the cancellation of the assessment upon the ground of nonresidence. The affidavit states: "I object to said assessment on the ground that I am not a resident of the city of New York for the purposes of taxation. I reside at Westhampton Beach, in the Town of Southampton, Suffolk County, New York. I have resided at said place for several years last past, and had my actual residence there from about the 1st of June, 1900, to about the first of October, 1900. After October 1 I came to the City of New York and stayed with my mother in said city in a house owned by her at No. 35 West Eighty-second street. I still have my residence at Westhampton Beach, and hold the same under a three years' lease. I expect to move there sometime next month. I was physically present at said residence at Westhampton Beach on July 1. I have never resided in a house that I owned or leased in New York City. Whenever I have been in New York City I have stayed with my mother." The return to the writ states that the commissioners ascertained that the relator resided on January 14, 1901, with his mother at No. 35 West Eighty-second street, New York, and was physically at that place on said date, and, further, that he voted in the borough of Manhattan at the election held in November, 1900. These facts are undisputed and comprise all the evidence presented to the commissioners of taxes, and it is upon this evidence that the court must determine the issue of residence. The language of the affidavit is open to criticism for indefiniteness and barrenness of legal proof to support the general allegations. The objection that the relator is not a resident "for purpose of taxation" is a conclusion of law. The mere allegation of residence, unsupported by the evidence thereof, is not sufficient. If by "actual residence" the relator means "physical presence" at Southampton, such presence is not conclusive. The relator does not state when the three years' lease at Southampton began, and the allegation is subject to the criticism that it may have commenced after the second Monday in January, 1901. The statement of expected return is evidence of present intention, but does not show past residence. The owning or leasing of a house

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in New York city is not necessary to residence in New York city which may subject one to taxation in the city, and sojourn with one's mother is no grounds for exemption. But the affidavit and the return to the writ present an issue of residence upon the following facts: The relator spent his summer, June to October, 1900, at Southampton; after October first he returned to New York city, where he stayed with his mother in a house owned by her at No. 35 West Eighty-second street; on July 1, 1900, he was physically present at Southampton; on the second Monday of January he was in New York city, and had voted there at the election in the preceding November. The relator relies upon People ex rel. Lord v. Feitner, 78 App. Div. 287. That case is not controlling here. The evidence clearly showed non-residence in New York city. The relator spent the greater part of her time in Lawrence, in a house which she had owned for a number of years. She spent but a short period of time in New York city in an apartment and then returned to Lawrence. She was actually in Lawrence on July first, and she was not in New York city on the second Monday of January. The evidence, therefore, supported her declaration that she considered Lawrence her residence. In the case at bar there is no evidence to support the relator's declaration of residence at Southampton other than the statement that he had his actual residence there during the summer months and was physically present there on July first. It is urged that the allegations are proof of residence at Southampton on July first, and that residence on that date determines the place of taxation. By section 8 of the Tax Law (Laws of 1896, chap. 908), it is provided: "Every person shall be taxed in the tax district where he resides when the assessment for taxation is made, for all personal property owned by him. * * * The residence of a person on July first shall be deemed his residence for the purpose of assessment and taxation during that year." Mr. Justice Ingraham, construing this section in People ex rel. Lord v. Feitner, says: "It is the evident intent of the law that a person shall be taxed on his personal estate in but one place in this State, which shall be the place of his actual residence, and the statute fixes definitely that the residence of the person on the first of July shall determine the locality in which the tax shall be assessed for the current year." He then adds: "It is quite true that the physical presence of a person on the first

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of July at any particular place does not determine that question. The question is as to the legal residence of the individual at that time." Where a person spends a portion of the year in New York city and a portion of the year elsewhere his legal residence for the purpose of taxation is determined by the evidence of his intention to make the one place or the other his legal residence. In this case the fact that the relator voted in New York city is important as evidence of his intention. Before voting the relator must have stated under oath that he had been a resident of the county of New York for four months prior to the day of election in the first week in November. As the relator did not return to New York until October first the four months' period during which he claimed residence in New York city extended over several months, during which the relator states that he actually resided at Southampton. The fact that a person voted in one place of residence and did not vote in the other place has frequently been considered as evidence of his intention in determining his residence for purposes of taxation. People ex rel. Lawrence v. Barker, 17 N. Y. Supp. 788; People ex rel. Blocher v. Crowley, 21 App. Div. 304, affd., 155 N. Y. 700; People ex rel. Wright v. O'Rourke, 32 App. Div. 66. In Paddack v. Lewis, 59 App. Div. 430, cited by the relator, the question arose under the provisions of the Revised Statutes, which made the place in which a person carried on his principal business the place of taxation. Under the present law the place of taxation is determined by the residence on July first merely. The act of voting is no evidence of the place of business, but it is evidence of that intention which determines the place of residence. On the evidence adduced I am of opinion that the relator was not a resident of Southampton on the 1st of July, 1900, and that he resided in the city of New York on the second Monday of January, 1901. The relator in his petition raises the further objection that the assessment was illegal "because the original entry in the books known as 'The Annual Record' was made at the sum of $15,000, and was subsequently changed to $50,000 without notice to your petitioner." This allegation is insufficient to show illegality. Section 896 of the Greater New York charter provides that the board of taxes may increase an assessment at any time before the first of April, but after the books are opened for correction and review on the second

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Monday in January, it shall not increase any valuation except upon notice to the individual affected by such increase. The relator merely states that a change was subsequently made. He does not show whether the change was made before or after the books were opened, and it may well be that the change was made before that date. The relator is attacking the assessment, and he has failed to sustain the burden of proof. It is, therefore, determined that the relator was properly assessed as a resident of the city and county of New York on his personal estate, and the writ of certiorari must be dismissed, with costs.

Writ dismissed, with costs.

THE PEOPLE ex rel. T. EATON CLAPP, Relator, *v.* CHARLES LISTMAN, as Commissioner of Public Safety of the City of Syracuse, Respondent.

(Supreme Court, Onondaga Special Term, March, 1903.)

Supreme Court — Will not ordinarily supervise matters of municipal administration.

The Supreme Court will not interfere by mandamus to compel the commissioner of public safety of a city of the second class to enforce the laws prohibiting the employment on Sunday of all labor, except for works of necessity and charity, and those prohibiting on that day all public exercises and dramatic and theatrical performances.

Interference by the Supreme Court with municipal administration is not to be encouraged, and while the court may act it should do so only in extreme cases.

APPLICATION for a peremptory writ of mandamus commanding the defendant to enforce those laws of the State of New York which prohibit the employment on Sunday of all labor except for works of necessity and charity and which prohibit on that day all public exercises and dramatic and theatrical performances.

Newell, Chapman & Newell, for relator.

A. H. Cowie, Corporation Counsel, for respondent.

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ANDREWS, J. The papers upon which the relator makes this application show that the defendant is commissioner of public safety of the city of Syracuse, and as such is the executive head of the police department of that city. It is his duty to see to it that the laws of the State are enforced within the limits of his territorial jurisdiction.

They further show that there are within the city of Syracuse certain public theaters in which there have been given on Sunday evenings so-called sacred concerts to which admission has been charged, and that these concerts have necessitated the employment upon that day of labor. These concerts are not sacred in any sense. In reality they are dramatic performances and constitute public exercises and shows within the meaning of the statute. They are, therefore, prohibited by the Penal Code. Nevertheless it is the intention of their managers to continue them in the future.

The attention of the defendant was called to these entertainments by a formal written complaint, and a demand was made that he use his power as head of the police department to put an end to them. He then caused two officers to attend a concert at the Bastable Theater on Sunday evening, January eleventh. Upon their report the matter was presented on Monday morning to the police justice of the city of Syracuse, who refused to issue any warrants for the arrest of the persons responsible for such concert on the ground that the same did not constitute a violation of law. As the alleged offense was a misdemeanor, the commissioner, in the absence of a warrant, had no power to cause any arrests to be then made, and he stated that he could not and would not do more than had already been done.

Upon these facts the relator makes this application, his object being practically to obtain a mandamus from this court which shall require the defendant to attend personally, or to cause his officers to attend such concerts as may be given in the future, and to arrest, or to cause the arrest, without a warrant, of persons holding such concerts, if the same shall be found to offend against the provisions of the Penal Code.

The answering affidavits of the defendant dispute none of these facts, but do state that he is and has been ready to enforce the laws of the State. This claim, however, seems inconsistent with the admissions of his counsel, made on the argument of this mo-

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tion, that these so-called concerts are illegal. If they are it is plainly his duty to act.

In view of this admission, and in view of the facts alleged and not denied in the papers before me, I shall, for the purposes of this decision, assume that the acts complained of are prohibited by the Penal Code. I shall also assume, without expressly so holding, however, that it is sought to compel a purely ministerial act on the part of the commissioner.

It may be well to determine in the first instance what other means may be employed by the relator to compel the enforcement of the criminal laws of the State in relation to the observance of Sunday. It is open to him to make a complaint before the grand jury. He may lay an information before the police justice of the city of Syracuse, and if that justice is satisfied that the crime complained of has been committed, and there is reasonable ground to believe that the defendant has committed it, he must issue a warrant of arrest. Code Crim. Pro., § 150. If the police justice willfully and improperly refuses to do his duty in the matter he may be removed by the Appellate Division of the Supreme Court. Const., art. VI, § 17; Code Crim. Pro., § 132. The information may be laid not only before a police justice, but before any justice of the Supreme Court, the county judge or the mayor of the city. Code Crim. Pro., § 147. If the crime is committed in the presence of the relator he may himself arrest the criminal and take him before a magistrate or deliver him to a peace officer. Code Crim. Pro., §§ 183, 185. If the alleged crime is committed in the presence of a policeman he may arrest, without a warrant, the person so committing it (Code Crim. Pro., § 177); and it is his duty to do so and to take him before the proper city magistrate to be dealt with in the same manner as if such person had been arrested upon a warrant theretofore duly issued by such magistrate. Charter Cities Second Class, L. 1898, ch. 182, § 181. If such policeman fails to do his duty a written charge may be made against him, and it then becomes the duty of the police commissioner to hear, try and determine the charge according to the rules of the police department, and he is given the power to inflict suitable punishment. Charter Cities Second Class, § 148. The commissioner himself has general charge of the police department, and to him is intrusted general supervision over the enforcement of the statutes of the State within the city boundaries. Charter

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Cities Second Class, § 174. With or without charges the commissioner may be removed by the mayor. Charter Cities Second Class, § 49. Upon the mayor himself is imposed the duty of seeing that the city officers faithfully perform their duties, and of maintaining peace and good order within the city and of taking care that the laws of the State are enforced therein. It is his duty to receive and examine all complaints made against any city officer for neglect of duty. Charter Cities Second Class, § 46. If any of the officers of the city, from the mayor downward, willfully neglect to perform their duty they are guilty of a misdemeanor and may be proceeded against in the criminal courts. Penal Code, §§ 118, 154, 471.

It has been said that mandamus may be called the spur by which municipal officers are moved to the performance of their duty. When a plain and imperative duty is specifically imposed upon such officers so that in its performance they act merely in a ministerial capacity without being called upon to exercise their own judgment as to whether the duty shall or shall not be performed, the writ of mandamus may be used to set them in motion.

It is also true that while the existence of an adequate and specific remedy by the ordinary process of the courts constitutes a sufficient bar to interference by mandamus, a mere statutory penalty against the officer for failure to perform an official duty, or the existence of a remedy by indictment for the omission of such duty, constitutes no objection to the granting of the writ.

The existence, therefore, of the numerous methods described above by which the relator can obtain his object without application to the Supreme Court is, in itself, no sufficient answer to such an application. But after all the writ of mandamus is an extraordinary remedy, and whether it shall or shall not be granted in a specified case rests largely in the sound discretion of the court.

There is no doubt that there are circumstances where such a power may be wisely exercised. It might well be that cases might arise where the neglect of the municipal officer is so flagrant, where the wrong is of so grave a character and where the public interests involved are so important that the court will not hesitate to resort to this remedy. But it should be used with caution. Ordinarily it is far better that the usual course should be pursued. The interference of the Supreme Court with the

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details of municipal administration is not to be encouraged. These details are intrusted by the people to officers chosen directly or indirectly by themselves. These officers are criminally responsible for a willful neglect of their duties, and upon them the responsibility for the government of our cities should usually be allowed to rest.

The Supreme Court is not so organized as to enable it conveniently to assume a general supervisory power over their acts; and indeed such an assumption by it would be contrary to the whole spirit and intent of our government. And yet if the application of the relator is granted it is difficult to see where the line is to be drawn. Every person aggrieved by the breach of any law or ordinance will attempt to secure its enforcement by mandamus rather than by the methods pointed out by the Code of Criminal Procedure. There is, for instance, an ordinance in the city of Syracuse against the use of the sidewalks by bicycles. It is habitually broken. Should the Supreme Court compel the enforcement of this ordinance by the use of its writ? I use this illustration not to belittle the gravity of the offense pointed out by the relator, but to show the inevitable and logical result of such action as he desires.

As was said before, there may be times when the power of the court should be used. This power is undoubted and unquestionable and it may be invoked by any citizen. But it should be reserved for extreme cases. It does not seem to me that this is one of them.

Attention is called to the action of this court in People ex rel. Gallagher v. Duncan W. Peck, as Commissioner of Public Safety of the City of Syracuse. In that case an application was made to compel the defendant to enforce the laws of the State with regard to ball-playing on Sunday. The affidavits of the relator showed that the defendant had failed to enforce such law, that such failure was intentional on his part and resulted from a design to allow the law to be systematically violated. The court there held that it had the power upon the application of any citizen of the State to compel the defendant by mandamus to perform his duty. An issue of fact, however, was raised by the defendant who stated that he had in good faith attempted to carry out the law in the past and that he would do so in the future. An alternative writ of mandamus was thereupon granted. Whether, in that instance,

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with all of the evidence before it the court would or would not have granted the peremptory writ of mandamus was not determined.

The application of the relator is denied with ten dollars costs.

Application denied, with ten dollars costs.

Matter of the Petition of MARGARET J. STEVENS, for the Payment of Her Legacy from the Estate of FRANKLIN STEVENS, Deceased.

(Surrogate's Court, Washington County, March, 1903.)

Decree — Collateral attack.

A legatee under a will will not be permitted, through an order to an executor to show cause why her legacy should not be paid, to make a collateral attack upon a decree, to which she was a party, settling the estate and deciding former objections, as to charges against her legacy, which she now seeks in this manner to renew.

PROCEEDINGS by a beneficiary and legatee, requiring the acting executor to show cause why her legacy should not be paid.

J. Sandford Potter, for petitioner.

Abner Robertson, for acting executor.

DAVIS, S. This is a proceeding instituted by Margaret J. Stevens, a beneficiary and legatee named in the will of Franklin Stevens, deceased, requiring the acting executor to show cause why her legacy should not be paid.

The acting executor files a verified answer to the petition alleging that the legacy has been fully paid, and that all matters sought to be reviewed and considered in this proceeding were judicially settled by a decree of this court granted December 27, 1901.

It appears that by the terms of the will of the said testator this petitioner was to receive the interest and income of certain

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investments directed by the will to be made by the executor, and that certain expenses for the care and repairs and for the preservation of the property were to be charged, some to the *corpus* of the estate, others to the income, and some to the petitioner's share of the income.

Without going into details as to the merits of the several items, or whether they are promptly chargeable against certain funds of the estate, we think it sufficient to say for the purposes of this proceeding, that all those matters were fully considered, and judicially settled, in an accounting had in this court, in which all parties were cited and in court, and a decree granted December 27, 1901.

The petitioner in this proceeding claims that the decree was erroneous, and that the surrogate committed an error in decreeing certain expenses to be a charge upon the widow's share of the income. Whether that be so or not, we do not think that that question ought to be reviewed in a proceeding like this, commenced by an order to show cause. If the surrogate erred, and the decree is erroneous, the decree could have been appealed from, and the error corrected, or the decree could have been opened, which the law permits to be done under certain conditions, and when a sufficient cause is shown.

The court in this proceeding is not asked to open, modify nor to vacate the decree of December 27, 1901, but we are asked to make another decree, which would be in direct conflict with the one already granted.

So long as the decree of December twenty-seventh stands unreversed and unmodified, we think that all parties are bound by it, and that it ought not to be rendered null and void as to a material and substantial part of it, by another proceeding, commenced by an order to show cause.

Motion to dismiss the proceeding must be granted.

Proceeding dismissed.

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CHARLES H. TURNER, Plaintiff, *v.* THOMAS S. WALKER, Defendant.

(Supreme Court, Franklin Trial Term, April, 1903.)

Specific performance — Marketable title — Easements as incumbrances — Duty to co-owner of land.

In the absence of any language to the contrary in an executory contract for the sale of lands, the law implies a right in the vendee to receive a good title free from incumbrances and defects.

A right of way for a railway, and a right reserved to a railroad company, the original owner, to reenter for the purpose of building the same, are easements running with the land and constitute in law incumbrances.

Where the railroad company sells, with said reservations, and also binds its immediate grantee to pay the taxes due and to become due, a grantee of its grantee cannot, by permitting the lands to be sold for taxes and buying them in at the tax sale, cut off the title of the railroad company to its easements.

A co-owner of land cannot purchase the title of a co-tenant where the purchaser has a duty to perform in regard to it, for such a purchase is inconsistent with his duty and the title which he thus acquires inures to the common benefit.

ACTION to compel specific performance of a contract.

F. G. Paddock, for plaintiff.

Otis & Pressinger, for defendant.

HOUGHTON, J. The plaintiff brings this action against the defendant to compel the specific performance of a contract to purchase a large tract of forest land.

The contract is embraced in letters containing offers and acceptances. Waiving the question as to whether the contract was sufficient to satisfy the Statute of Frauds, and whether it was sufficiently definite as to the quantity of land to permit a decree of specific performance, I think the plaintiff's complaint must be dismissed on the ground that the plaintiff did not proffer a title free from incumbrances.

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A fair interpretation of the correspondence between the parties shows that the plaintiff expected to furnish, and the defendant expected to receive, a good title free from incumbrances or reservations. Correspondence passed between the parties proposing certain reservations. The plaintiff refused to buy the land with any reservations at any price. The final letter of the plaintiff was to the effect that he would sell the land at ten dollars per acre, making no reservations whatever.

In an executory contract for the sale of lands, in the absence of any language to the contrary, there is always implied, by law, the right to receive a good title clear of defects and incumbrances. Moore v. Williams, 115 N. Y. 592. Such a title I think the plaintiff failed to tender to the defendant.

The source of plaintiff's original title was from the Adirondack Railway Company through one Osborne. By the deed from the railway company to Osborne, the company reserved to itself, its successors and assigns, so much of the land conveyed as it or its successors at any time might require for a right of way to build a railroad, for its tracks, turnouts, sidings, stations, etc., and to do all by way of cutting timber and removing earth for the necessary construction thereof. It also reserved all minerals contained upon or in said land with the right to take and mine the same. In addition to these rights, the privilege of constructing dams and docks for the purpose of floating and driving logs from other lands belonging to the company, through and to the lands conveyed; and to use so much timber and stone from the lands conveyed as might be necessary and convenient in constructing and keeping the dams, docks and such improvements in repair, with the right to the grantee to use said improvements upon paying a proportional part. At the time of the giving of the deed by the railway company, the land was evidently deemed more valuable for lumbering than for other purposes. Since that time it has become more valuable as a private forest preserve, and such was its intended use by the defendant. The tract contained streams and a considerable body of water, and one of the contentions upon the trial was as to whether or not the defendant should pay for a considerable number of acres covered by a lake.

Aside from the legal aspect of this reservation, it is manifest that the right of way and right of entry reserved to the original grantor would be very harmful to the use of the land as a private

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park. In the deed from Osborne to the plaintiff these rights of the railway company were excepted. They were easements or servitudes running with the land. As such they constituted in law an incumbrance. Wetmore v. Bruce, 118 N. Y. 319; Forster v. Scott, 136 id. 582.

The plaintiff contends, however, that the rights of the railway company were cut off by a tax title which he obtained between the making of the contract with the defendant and the tender of a deed to him.

The tax deed executed by the Comptroller of the State to the plaintiff is dated January 24, 1901, and recites that the plaintiff purchased in the month of December, 1895, the premises in question, which were sold for the payment of taxes levied prior to the year 1893. At the time of such purchase, the plaintiff was the owner of the premises under his deed from Osborne, which is dated January 26, 1892. The deed from the railway company to Osborne provided that the grantee should pay all taxes imposed upon said land then due or to become due. There were deducted from the purchase price in the deed from Osborne to Turner all taxes against said lands due at the date of the conveyance. It does not appear from the evidence for what years prior to 1893 the tax sale of 1895 was had. The usual course pursued in the Comptroller's office, which I think the court can take judicial notice of, is not to sell lands every year for unpaid taxes, but to advertise for sale only at stated periods, and then sell for the unpaid taxes of whatever years default has been made in. There was an implied agreement, I think, on the part of plaintiff, he having deducted from the purchase price all taxes due prior to January, 1892, to pay those taxes, and I think it cannot be presumed, in the absence of any proof, that the sale of 1895 was only for the taxes of 1892. If it was material to show for what years of unpaid taxes the sale was had, there being a *prima facie* incumbrance upon the property, the burden was upon the plaintiff to show that the sale was not had for any year prior to 1892. But I can see no reason why the agreement to pay taxes thereafter levied upon the property, on the part of Osborne, was not a covenant running with the land, and, therefore, a binding obligation on the plaintiff, as well as Osborne, to prevent the land being sold for taxes.

The railway company, in its conveyance to Osborne, reserved

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a very broad, and possibly a very valuable, easement to itself and its successors. It was interested in the preservation of the property so that it might ultimately enjoy the rights reserved to itself. Osborne did not acquire the whole absolute title to the property. He held the larger estate, but it was subservient to the easements and servitudes remaining in the company. He could do nothing to the land which would prevent the enjoyment of those servitudes. If it was practical for him to build some structure or do some act that interfered with the right of way, or the right to take minerals, or the right to build dams and docks, reserved to the railway company, which prevented the exercise of those rights, he could have been enjoined from so doing, or compelled to remove them. Osborne, therefore, and this plaintiff, as his grantee, were in a sense joint owners with the railway company, of the land, and it was the duty of the owner of the greater interest, who had possession, to keep the property in such condition as would allow the railway company to enjoy its rights reserved to it when it saw fit to exercise them. One of those duties was to pay the taxes so that the rights of the railway company would not be destroyed by a tax sale. A covenant by a tenant to pay taxes during his term is a covenant running with the land and binds him and his assignees. Post v. Kearney, 2 N. Y. 394. He cannot allow the premises to be sold at tax sale and acquire title as against his landlord. It being his duty to pay the taxes, whatever title he obtained is for the benefit of the real owner. Burgett v. Taliaferro, 118 Ill. 514. This is upon the familiar principle that where a duty rests upon a party in respect to the property of another, the violation or omission of which will result in a sale of the property, and where a sale is made because of such breach of duty, the person owing it is disqualified from becoming a purchaser at the sale for his own account. Bennett v. Austin, 81 N. Y. 308. A mortgagor, whose duty it is to pay the taxes, cannot allow the property to go to a tax sale, and by its purchase cut off the mortgage. Powell v. Jenkins, 14 Misc. Rep. 85. But even if the agreement to pay taxes did not amount to a covenant running with the land and so become binding upon this plaintiff, still by neglecting to pay the taxes he could not purchase an outstanding title which would cut off the rights of the railway company. The plaintiff and the railway company were not cotenants of the land, but in law they

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were co-owners, each having vested rights, one depending upon the other, and both were interested in the title. A cotenant is bound to protect the interest of those who stand in the same relation with himself to the property, and he cannot suffer the land to be sold for taxes and buy the title for his exclusive benefit, but the title he receives inures to the common benefit. Burhans v. Van Zandt, 7 N. Y. 523. It is not alone guardians, trustees and attorneys, who cannot become purchasers of property on their own account, but the rule is of universal application to all persons coming within its principle, that one cannot be permitted to purchase an interest where he has a duty to perform that is inconsistent with the character of a purchaser. Van Epps v. Van Epps, 9 Paige, 237; Torrey v. Bank of Orleans, id. 663. The case of Williams v. Townsend, 31 N. Y. 415, recognizes the principle stated, but holds that a mortgagee, in obtaining title hostile to his mortgagor, does not come within the principle, because he is under no obligation to pay the taxes.

The case of Chard v. Holt, 136 N. Y. 30, is not an authority against the principle here enunciated. In that case the holder of the tax title was under no obligation to pay the taxes, nor did he sustain any relation with respect to the title which made it improper for him to obtain title hostile to the owner.

My conclusion, therefore, is that the plaintiff stood in such relation to the rights of the Adirondack Railway Company, that he could not obtain a title hostile to those rights by purchasing under the tax sale, and that whatever he thus obtained was for the benefit of himself and his co-owner. His purchase, in effect, was but a mere redemption from the tax sale. Therefore, the easements and servitudes of the Adirondack Railway Company constitute an incumbrance upon the land, and the plaintiff's complaint must be dismissed, with costs.

Complaint dismissed, with costs.

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THE PEOPLE OF THE STATE, Plaintiff, *v.* PATRICK SUMMERS et al., Defendants.

Crimes — Oppression; Penal Code, § 556 — Duty of police in New York city.

The crime of oppression is made out, *prima facie*, by the deposition of a complainant showing that he keeps a retail cigar store in New York city, that a police captain and three patrolmen — not exhibiting any warrant — came into his store, that some of them remained there during business hours for eleven days, that they refused to leave, and that their presence hurt his business.

Before Mr. Justice Gaynor as a magistrate.

THE defendants, who are a captain of police and three patrolmen under him, were arrested under a warrant issued by a Justice of the Supreme Court acting as a magistrate. The charge against them was the crime of oppression under section 556 of the Penal Code. The defendants after being arraigned before the said magistrate moved to dismiss the case on the ground that the facts charged in the deposition did not show a criminal offence.

Morgan & Conran for prosecution.

P. E. Callahan for defence.

GAYNOR, J.: The motion to dismiss must be denied; and it seems best to state the law of the case now for guidance on the preliminary hearing. This captain of police, and the three patrolmen who acted under his orders, are charged with the serious crime of official oppression. The last indictment and conviction for this crime in this part of the state were, I think, of Sutherland, who was a party to the lawlessness of the McKane police, who entered houses without warrants, and arrested people without warrants for alleged misdemeanors not committed in their presence, and generally trampled on individual rights in defiance of the law until the community could suffer it no longer.

These defendants now claim that the acts with which they are charged in the complainant's deposition do not make out the crime of oppression. On the decision of this motion it has to be

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taken as true that they did the acts alleged in such deposition, and what is hereafter said will be on that theory.

Section 556 of the Penal Code which defines the said crime is as follows:

"A public officer, or a person pretending to be such, who, unlawfully and maliciously, under pretense or color of official authority,

1. Arrests another, or detains him against his will; or,
2. Seizes or levies upon another's property; or,
3. Dispossesses another of any lands or tenements; or,
4. Does any other act whereby another person is injured in his person, property or rights;

Commits oppression, and is guilty of a misdemeanor."

The deposition states that the complainant keeps a retail cigar and tobacco store; that this police captain, accompanied by these three patrolmen, came into his store on March 12th, and that they remained there in possession all of that day, and then continuously all of the following eleven days, some of them being there all the time from 9 o'clock in the forenoon until 6 o'clock in the afternoon; that they refused to go out on the demand and protest of the complainant; that they said they were officers and would remain; that their presence in the complainant's store gave him and his store a bad name, and deterred people from coming in and trading with him, thereby injuring him in his good name and business.

These acts fully make out the crime of oppression charged. By section 556 of the Penal Code which has been quoted above, unlawful arrests and detentions by the police, unlawful seizures by them of another's property, and generally any unlawful acts by them "whereby another person is injured in his person, property or rights," constitute the crime of oppression.

It is difficult to conceive how any one so ignorant as to suppose that the police have the right to do what these defendants are charged with could ever be made a captain of police in any community of enlightened American citizens. It does not seem to be explainable at all, except on what might well be deemed the incredible theory that not only ordinary policemen but even police captains are appointed to the police force in the city of New York without any instruction or examination whatever in respect of the rights of individuals, and the limitations on the power of

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the police to make arrests, or enter houses or private places, or meddle in any way with others; or else on still another theory, namely, that in the past those in official control of the police force have not only sanctioned such acts of police lawlessness, but often required them to be committed, until they grew to be deemed lawful.

The principal duty of the police is to be in the streets and public places, and there preserve the public peace, and keep outward order and decency. When they are allowed or required to depart from this, and obtrude into houses at will, they are thereby enabled to levy extortion and blackmail on the community. It is difficult to conceive how any one who sincerely wants to prevent such extortion and blackmail, and break up all association between the police and certain social offenders, should favor the entry of houses by the police without warrants. The law knows of no greater folly than the notion that the police are the custodians or conservers of the private morals of the community, or could be made such with any safety whatever, or with any possibility of uplifting morals instead of debasing them. The moral growth of a community depends on its churches, schools and teachers, and the influence of a healthy and comfortable home life, and not on the police.

If these defendants had a warrant for the arrest of the complainant, it was their duty to arrest him and take him before the magistrate. If they had a search warrant, it was their duty to make the search expeditiously and go. If they had no warrant, then their entry into and possession of his place was lawless, and calculated to lead to disorder, for he had a right to resist them with all the force necessary.

It was said on the argument that the floor above the plaintiff's store is occupied by a club of men, and that this captain suspects they play cards for money, or do some kind of gaming, there, and wants to stop them. But that gives no right to the police to enter or stay in the complainant's store. If they had any warrant, whether to arrest any one, or search the club premises, it was their duty to execute it and go away. If they had no warrant, then their presence was unlawful, whether in the complainant's store or in the club rooms.

The learned counsel for the defendants cites a part of section 315 of the city charter as authorizing the defendants to enter

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private houses and places without warrants. It purports to make it the duty of the police "at all times of the day and night" to "carefully observe and inspect all places of public amusement, all places of business having excise or other licenses to carry on any business; all houses of ill-fame or prostitution, and houses where common prostitutes resort or reside; all lottery offices, policy shops, and places where lottery tickets or lottery policies are sold or offered for sale; all gambling houses, cockpits, rat pits, and public common dance houses, and to repress and restrain all unlawful and disorderly conduct therein." But this provision is not open to the construction contended for, as the police have been heretofore fully informed. The police may enter and inspect licensed places to a reasonable extent, but they have no such right in respect of private houses and places. They cannot enter the latter at will, or on suspicion, or on what they may choose to call their suspicion. This charter provision only means that they must observe and inspect them from the outside. If it meant more than this it would be void. It is a constitutional principle of government, here and in England, and of free government generally, that one's house may not be entered by the police or by government except under a warrant. The exceptions in the case of pursuing fleeing felons, or persons escaping from arrest, and the like, do not need to be stated here. The trouble with this charter provision is that it is crude and bungling. It mingles lawful and unlawful places together in one common class, and requires the police to inspect them and preserve order in them; whereas there is no such thing as the police standing about and preserving order in the latter places, as in the former, for they cannot be sanctioned or suffered to exist at all. While its true interpretation is plain enough, it is nevertheless open to a false construction which enables the police to claim the right of visitation over houses of ill-fame and gambling houses, for instance. This would enable the police to take such places under their protection and practically license them, and derive a vast fund from them. It seems strange that a provision liable to be used for such a purpose should be permitted to remain in the city charter. The District Attorney of New York county, and also of Kings county, have called attention to its loose and dangerous character.

The motion is denied.

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JOHN M. HARRINGTON, Respondent, *v.* LAURA BAYLES, Appellant.

(Supreme Court, Appellate Term, April, 1903.)

Foreclosure — Referee's fees in New York county — Commissions — Compensation where the action is settled before any sale — Auctioneer not entitled to fees on adjournments.

The fees of a referee, appointed to sell in an action of foreclosure triable in the county of New York, are governed solely by the Consolidation Act (L. 1882, ch. 410, § 1088).

The referee is also entitled to commissions and these are fixed by Code Civ. Pro., § 3297.

The total of his fees and commissions cannot exceed fifty dollars unless the mortgaged property sold for ten thousand dollars or upwards.

Where the owner of the equity of redemption pays the judgment after the printing of the notice of sale but before sale made, the referee is not entitled to any commissions and is entitled to no fees under the Consolidation Act except for receiving the order of sale and posting the notices thereof and for adjourning the sale, not exceeding three times.

There is no statutory authority for paying the auctioneer fees for adjournments of the sale and no such disbursement can be allowed the referee.

APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, eleventh district, borough of Manhattan, rendered in favor of the plaintiff upon a trial had before the court, without a jury.

Alfred Pagelow, for appellant.

John M. Harrington, respondent, in person.

GIEGERICH, J. The action is to recover fees for services rendered by the respondent, as referee, under a judgment of foreclosure and sale in an action in which the appellant was the plaintiff, and for auctioneer's fees paid therein by the respondent.

The pleadings were written. The complaint contained two

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causes of action; one for services rendered as such referee at the appellant's request, the value of which was placed at fifty dollars, and the other for fees of an auctioneer amounting to fifteen dollars, which the respondent claims were paid by him as a disbursement in connection with his duties as such referee. The answer put in issue the allegations as to the rendition and value of the services, and for a separate defense set up that a sale of the premises never took place, and that in consequence thereof, neither the respondent nor the auctioneer became entitled to any fees whatever.

It appears from the evidence elicited, and the admissions made at the trial, that the respondent was served with a certified copy of the judgment by the representative of the attorneys for the plaintiff in such foreclosure action; that the respondent selected an auctioneer, caused the notice of advertisement of sale to be published and on the day fixed for the sale attended at the place where the premises were to be sold, and at the request of the plaintiff's attorney in such action adjourned the sale to a subsequent date, and that when that date arrived he again attended, and upon the like request adjourned the same, and that in the meanwhile the owner of the equity of redemption offered, and the respondent accepted, the full amount of such judgment, including costs. The respondent subsequently demanded payment of his fees, but no part thereof was paid.

Testimony was also given to the effect that the sum paid to the auctioneer by the respondent for adjourning the sale was reasonable.

At the trial the appellant contended that under section 1088 of the Consolidation Act (L. 1882, ch. 410), the respondent was not entitled to any fees whatever, but the justice held that the point was not well taken and gave judgment in the latter's favor for the full amount claimed, and an appeal was taken to this court.

When the appeal was reached for argument, the respondent claimed that it was in the same position as if it had been actually dismissed, by reason of the appellant's failure to argue the appeal at the December term, as required by the order granted herein on October 22, 1902, upon a motion to dismiss the appeal for failure to file a return. While it is true that the appeal was not argued at such term, it is equally true that the argument thereof was for a good and sufficient reason postponed until the present term

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without prejudice to the rights of the appellant, and under such circumstances we had no alternative but to overrule the objection and direct that the argument of the appeal proceed. The respondent thereupon refused to take any further part in the appeal, and it is to be regretted that such important questions as are presented have to be decided without the assistance of either an oral argument or a brief in his behalf.

It was said by the court in Innes v. Purcell, 2 T. & C. 539, in speaking of the fees of a referee: "It has always been the policy of the law to prescribe and fix the compensation which may be demanded for the performance of legal duties by public officers. And where no provision has been made, either directly or indirectly, no fees can lawfully be demanded. Costs and fees are recoverable by virtue of statutory authority, and where no such authority exists, no claim for their recovery can be strictly maintained," citing Downing v. Marshall, 37 N. Y. 380.

The question thus arises whether there is any statute fixing the fees of a referee in foreclosure sales in New York county, and if so, at what rate. In order to obtain a thorough understanding of the situation, it becomes necessary to examine the various statutes which were passed before the provisions of the Consolidation Act above referred to were enacted, and the decisions construing such statutes.

Prior to the adoption of the Constitution of 1846, mortgages were foreclosed by action in the Court of Chancery and the sale was made under the direction of a master in chancery. His fees for performing certain services were prescribed with great particularity by the Revised Laws and subsequent enactments. Thus under the Revised Laws of 1813 (1 R. L. 5, 6, § 1), he was entitled to fifty cents for drawing the advertisement or public notice of sale; one dollar for attending and adjourning sale; five dollars for preparing and executing a deed to the purchaser, and such further allowance by way of commissions as the Chancellor judged to be reasonable. Besides these fees the master was allowed the printers' bills. These provisions, except those relating to an additional allowance, were incorporated into the Revised Statutes, 2 R. S. pt. 3, chap. 10, tit. 3, § 7, pp. 625, 626. The latter provided for the allowance by the Chancellor of commissions, not exceeding the sum of twenty dollars, after notice given to the party to be charged therewith. These provisions

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remained in force until 1880, when they were repealed. Chapter 245, p. 368. The fees allowed by the Revised Statutes were materially reduced by chapter 342 of the Laws of 1840, but such act was repealed in the following year. Laws of 1841, chap. 237.

The Constitution of 1846 having abolished the office of master in chancery, as well as the court itself, the Judiciary Act of 1847 (chap. 280) was passed in order to meet the necessities arising from the changes thus made. Section 77 thereof, among other things, provided that, after the first Monday of July of that year, sheriffs might sell any lands in their respective counties ordered to be sold by decree of any court of record in the State, and give conveyance thereof in the same manner and with like effect as was then done by a master in chancery, and for that service, it was further provided, that, in addition to his disbursements for printers' fees, he should be entitled to receive the same fees as upon sales by virtue of an execution, but that the whole should in no case exceed the sum of ten dollars.

The foregoing provisions were repealed by the Laws of 1877 (chap. 417, p. 471), and by the Laws of 1880 (chap. 245, p. 370).

In 1869, an act (chap. 569) relating exclusively to the city and county of New York was passed. Since this is the source of various subsequent enactments relating to the fees of officers authorized to sell lands in foreclosure actions as well as in actions of partition, it is herewith set forth in full:

"SECTION 1. All sales of real estate hereafter made in the city and county of New York under the decree or judgment of any court of record (except sales in cases of partition, and where the sheriff of said city and county is a party) shall be made by the sheriff of said city and county.

"§ 2. In cases of sales on foreclosure, he shall be entitled to receive the following fees and no more: for receiving order of sale and posting notices of sale, ten dollars; for attending sale, ten dollars; for drawing each deed of premises sold, five dollars; for attending and adjourning a sale at the request of the plaintiff in the action or by order of the court, three dollars, but no more than three such adjournments in one action shall be charged for; for making report of sale, five dollars; for paying over surplus moneys, three dollars. And all disbursements made by him for printers' fees at the rate allowed by law therefor, fees of officers for taking acknowledgments and administering oaths, and for in-

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ternal revenue stamps affixed to conveyances executed and delivered by him, and all auctioneers' fees actually paid by him, but not to exceed for such auctioneers' fees twelve dollars for each parcel separately sold, which auctioneers' fees shall be paid by the purchaser of the parcel in addition to the amount bid by him therefor.

"§ 3. In cases where there is no other officer to whom, according to the provisions of law, a police justice may direct a commitment, and when no such officer is present, such police justice shall direct the same to the sheriff of said city and county, who shall be entitled to receive such fees for his services therefor, not exceeding fifty cents on each commitment, as shall be allowed by the supervisors of the county of New York.

"§ 4. In cases of sales in actions of partition by referees appointed by the court, they shall be entitled to receive the same fees and disbursements as are allowed by section two hereof to the sheriff of the city and county of New York, and in addition thereto commissions on all moneys received and paid out by them, at the same rate as are allowed by law to executors and administrators. Provided, however, that the commissions allowed by this section shall not, in any case, exceed the sum of five hundred dollars."

Section 1 of the foregoing provisions was amended by chapter 192 of the Laws of 1874, as hereafter shown, and as thus amended, it, together with section 2, has been included in section 1088 of the Consolidation Act; section 3 was repealed by the Laws of 1874 (chap. 192) and by the Laws of 1881 (chap. 537, p. 772); and section 4 was repealed by the Laws of 1880 (chap. 245, p. 372). See Silvernail's Index to the Laws of New York from 1775 to 1897, p. 537, but its provisions were modified and embodied in section 3297 of the Code of Civil Procedure. See Throop's Ann. Code of 1891, p. 901.

As above noted, section 1 of the foregoing act was amended and section 3 thereof was repealed by chapter 192 of the Laws of 1874, the former, as thus amended, reading as follows: "Sales of real estate hereafter made in the city and county of New York, under the decree or judgment of any court, may be made by the sheriff of said city and county, or by a referee appointed for that purpose, by such judgment or decree; but when any sale is made by any officer other than the sheriff no greater

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sum shall be charged or allowed as fees than is prescribed in section 2 of this act."

By the act of 1876 (chap. 431, § 11, p. 456), section 309 of the Code of Procedure was among other things amended by adding the following provision: "Nor shall a greater sum than fifty dollars be charged by or allowed to any sheriff, referee or other officer for his fees, percentage or services for any sale under a decree or judgment of foreclosure."

On the first day of September, 1880, sections 1496 to 3356, both inclusive, comprising chapters 14 to 22 inclusive, of the Code of Civil Procedure went into effect. Among these is section 3297, which as amended by subsequent enactments reads as follows: "The fees of a referee appointed to sell real property pursuant to a judgment in an action, are the same as those allowed to the sheriff, and he is allowed the same disbursements as the sheriff. Where a referee is required to take security upon a sale, or to distribute, or apply, or ascertain and report upon the distribution or application of any of the proceeds of the sale, he is also entitled to one-half of the commissions upon the amount so secured, distributed or applied, allowed by law to an executor or administrator for receiving and paying out money. But commissions shall not be allowed to him upon a sum bidden by a party, and applied upon the party's demand, as fixed by the judgment, without being paid to the referee, except to the amount of ten dollars. And a referee's compensation, including commissions, cannot, where the sale is under a judgment in an action to foreclose a mortgage, exceed fifty dollars, unless the property sold for ten thousand dollars or upwards, in which event, the referee may receive such additional compensation as to the court may seem proper, or in any other cause five hundred dollars."

This section is said by Mr. Throop to have been taken from the Laws of 1869 (chap. 569, § 4), as amended by chapter 192 of the Laws of 1874; and section 309 of the Code of Procedure, as amended by the Laws of 1876, chapter 431, *supra*. Throop's Ann. Code of 1891, p. 901.

In 1882 the Consolidation Act (chap. 410) was enacted, section 1088 above referred to reading as follows: "Sales of real estate hereafter made in the city and county of New York, under the decree or judgment of any court, may be made by the sheriff of said city and county, or by a referee appointed for that pur-

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pose, by such judgment or decree; but when any sale is made by any officer other than the sheriff, in an action of foreclosure, no greater sum shall be charged or allowed as fees than the following. In cases of sale on foreclosure, the sheriff shall be entitled to receive the following fees and no more: for receiving order of sale and posting notices of sale, ten dollars; for attending sale, ten dollars; for drawing each deed of premises sold five dollars; for attending and adjourning a sale at the request of the plaintiff in the action or by order of the court, three dollars, but not more than three such adjournments in one action shall be charged for; for making report of sale, five dollars; for paying over surplus moneys, three dollars, and all disbursements made by him for printers' fees at the rate allowed by law therefor, fees of officers for taking acknowledgments and administering oaths, and all auctioneers' fees actually paid by him, but not to exceed for such auctioneers' fees twelve dollars for each parcel separately sold, which auctioneers' fees shall be paid by the purchaser of the parcel in addition to the amount paid by him therefor."

The foregoing provisions were taken from the Laws of 1869 (chap. 569, §§ 1, 2), as amended by the Laws of 1874 (chap. 192. See Laws of 1880, vol. II, p. 303, marginal note; Silvernail's Index, *supra*), and are unaffected by the Greater New York Charter, Ash's Greater New York Charter, LXI.

Before passing to the consideration of the question whether the foregoing section has been superseded, it becomes necessary to consider the same, as well as the other enactments upon the subject, in the light of the decisions which have been handed down from time to time. In 1840, while the act passed in that year (chap. 342) was in force, the Chancellor in construing its provisions held that the restriction contained in such act that no other fees whatever than those therein prescribed should be taxed or decreed against the defendant or demanded or received from him did not have the effect of excluding the power to award commissions provided for by the Revised Statutes. Delavan v. Payn, 8 Paige, 459.

In the case cited, the Chancellor, in discussing the effect of said act upon the commissions allowed by the Revised Statutes, among other things, said (at p. 460): "The question therefore arises, whether the term *fees,* as used in that act, includes the compensation allowed by the former statute, by way of commis-

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sions upon moneys received and paid over by masters, and other officers of the court. By referring to the general fee bill in the revised statutes, it will be seen that the master's fees upon sales in this class of mortgage cases were very much reduced by the act of May, 1840, so as to give him a very trifling compensation for his services in advertising the property, attending the sale and drawing the deed and report; exclusive of his risk and responsibility in receiving and paying out moneys. I cannot therefore believe that the legislature intended, in that act, to deprive the master of the commissions which were allowed to him under the revised statutes. The provision in the revised statutes, authorizing the master to charge for disbursements and for commissions upon sales, is contained in the same clause of the section of the statute relative to masters' fees. And as neither the commissions nor the disbursements are, in common parlance, or even in technical language, called *fees*, if the master is not allowed to retain his commissions upon sales under the recent act, it is difficult to say upon what principle he can be permitted to retain for his disbursement for the printer's bill. I conclude then that the term 'fees,' in the act of May last, was not intended to deprive the master of his commissions."

That decision was followed in Innes v. Purcell, *supra*, decided in the year 1874, wherein the General Term of the First Department, reversing an order allowing $100 to a referee appointed to sell in a foreclosure action, held that the power to allow commissions provided by the Revised Statutes still continued, notwithstanding the Act of 1847 limited the fees to the amount of ten dollars and also, in construing section 287 of the Code of Procedure, as amended by the Laws of 1851, Appendix 95, directing that real estate adjudged to be sold must be sold by the sheriff of the county or by a referee appointed for that purpose and that thereafter the sheriff or referee must execute a conveyance which shall be effectual to pass the rights and interests of the parties adjudged to be sold, held that the referee appointed to sell in such an action is entitled only to the same amount allowed by law to the sheriff for the performance of a similar duty.

In Ward v. James, 8 Hun, 526, decided in October, 1876, a gross sum of fifty dollars was allowed the referee in a foreclosure action where the property was not sold, although advertised for sale, and it was held that the court below had no power to award it.

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In Walbridge v. James, 16 Hun, 8, the property was situated in a county other than New York and it was held by the General Term of the Third Department in November, 1878, that the effect of the limitation placed by section 309 of the Code of Procedure was to fix the maximum of fees and that such limitation stood at fifty dollars, instead of ten dollars, fixed by the former statute, but that it expressly covered both fees and percentage. It was further held that where a sale was for any reason ineffectual, the referee was entitled, under the circumstances, to fifty cents for receiving and entering the decree, and two dollars for advertising the property for sale. The former fee appears to have been warranted by chapter 415, Laws of 1871, entitled "An act in relation to the fees of sheriffs except in the counties of New York, Kings and Westchester," and the latter by part 3, chap. 10, tit. 3, § 38, of the Revised Statutes.

It should be observed that all these decisions were promulgated subsequent to the decision in Gaskin v. Meek, 42 N. Y. 186, in which it was held that the act of 1869 was unconstitutional because it violated the provision of the Constitution prohibiting the passage of a private or local act containing more than one subject and requiring that it be expressed in the title.

The amendment of 1874 having obviated the constitutional objection, the constitutionality of the act in question was finally sustained by the decision of the Court of Appeals in Richards v. Richards, 76 N. Y. 186, in 1879.

It was held by the Monroe County Special Term in Birge v. Ainsworth, 59 How. Pr. 473, in March, 1880, that the poundage of referees in cases of sales on foreclosure was limited to ten dollars, and was not increased by the act of 1876 amending section 309 of the Code of Procedure, and that said amendment did not give the right to such fees or poundage, but that it was merely a limitation of the fees or poundage allowable, the right thereto being dependent upon other statutory provisions.

In the same month and year it was held, in Schermerhorn v. Prouty, 80 N. Y. 317, that the only effect of the act of 1876, amending section 309 of the Code of Procedure, had upon the act of 1869, was to fix a minimum of fees, that the latter was a local act, and the amendment to the Code was a general law, not inconsistent therewith, except so far as it modified it in the respect hereafter mentioned, and that such act regulated the fees

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of the sheriff or referee on foreclosure sales in the city and county of New York, subject only to the limitation in the act of 1876 that in no case shall they exceed fifty dollars.

It will be seen from the foregoing enactments and decisions that when section 3297 of the Code of Civil Procedure above cited went into effect, the fees allowed for services rendered on foreclosure sales were not uniform throughout the State, but that, so far as the county of New York was concerned, such fees were measured by the act of 1869; that besides these fees, commissions not exceeding twenty dollars might be allowed under the Revised Statutes to the officer making the sale; that section 309 of the old Code, as amended by the Act of 1876, did not give the right to the sum of fifty dollars, but only fixed the maximum of fees, percentage and services at that sum, leaving unchanged the scale of charges, up to this limit, as fixed by the various enactments, general or special, affecting the county where the real property was situated.

It might be argued with considerable plausibility that section 2 of the act of 1869, relating to fees on foreclosure sales, has been repealed or superseded by the provisions of the Code of Civil Procedure, and stress might be laid especially upon the language of the first sentence of section 3297, that the fees of a referee are the same as those allowed to the sheriff. Such words, however, merely indicate that the fees allowed to the sheriff for selling real property pursuant to a judgment in an action when the said section went into effect were left unchanged; in other words, the various provisions for quantity or amount of sheriff's fees, whether general or local, were left unaffected. The words "the sheriff" as used in section 3297 clearly refer to the sheriff of the county where the real property ordered to be sold is situated, and not to sheriffs generally. The foregoing views are strengthened by the language of section 3308 of the Code of Civil Procedure, which is as follows: "The last section (regulating sheriffs' fees), except the limitation of amount contained in subdivision eleventh thereof, does not affect any special statutory provision, remaining unrepealed after this title takes effect, relating to the fees and expenses of the sheriff of the city and county of New York, or the sheriff of the county of Kings."

The sheriff's fees on foreclosure in the county of New York, as already observed, were then regulated by section 2 of the Act

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of 1869, which has not been specifically repealed, but on the contrary, its provisions have been included in section 1088 of the Consolidation Act.

From what has preceded, it is clear that section 2 of the act of 1869 must be regarded as having been engrafted upon section 3297 of the Code of Civil Procedure, and therefore, that the former, which, as above noted, is a local act, instead of section 3307 of the Code of Civil Procedure, which relates to the fees of sheriffs generally, regulated the fees of the sheriff, as well as referees on foreclosure, in the county of New York when section 3297 went into effect, in 1880.

These views are further supported by the conclusion reached by the late Court of Common Pleas in the case of Lockwood v. Fox, 1 Civ. Pro. 407; 61 How. Pr. 522. There, as here, the action to foreclose a mortgage was settled by the parties after advertisement and before the sale. Before the settlement the defendant tendered to the referee the sum of ten dollars, claiming that to be the proper amount under the Act of 1869, for receiving the order of sale and printing the notices of sale. The referee declined to accept this amount, claiming that his fees were regulated by the Code of Civil Procedure, and that thereunder he was entitled to poundage on the amount paid in settlement of the judgment, and moved to tax his fees. The court at Special Term sustained the referee, but reduced his fees to fifty dollars. The defendant appealed to the General Term, which reversed the order, and held that the statute of 1869 was a local act and, therefore, was unaffected by virtue of section 3308 of the Code of Civil Procedure, and that, as the referee's fees must be taxed under said act, he was entitled to only the sum of ten dollars.

The court, in the case just quoted, among other things, said: "It is apparent, from examination, that referee's fees must be taxed, under chapter 569 of the Laws of 1869, as amended by chapter 192 of the Laws of 1874, unless a change has been made by the provisions of the Code of Civil Procedure. Schermerhorn v. Prouty, 80 N. Y. 317. There was no direct repeal of the specified enactments by the repealing acts. The statute of 1869, being a local act, is, therefore, unaffected, by virtue of section 3308, Code of Civil Procedure, to which the attention of

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the learned justice in the court below could not have been directed."

The principle laid down in the foregoing case was reiterated by the same court in Brady v. Kingsland, 67 How. Pr. 168, and these decisions may, therefore, be regarded as authorities for taxing the fees of a referee in foreclosure cases, under the Act of 1869, as included in section 1088 of the Consolidation Act, instead of the Code of Civil Procedure, unless a change has been made by the provisions of the act "in relation to the office of the sheriff in the city and county of New York." Laws of 1890, chap. 523, and amendments thereof.

It cannot be fairly claimed, from a reading of the Act of 1890, that it either superseded or in any way affected the Act of 1869, or section 1088 of the Consolidation Act, which continued the portion in question. The enactment of 1890 does not provide for a direct repeal of either of such enactments, and from the view expressed by the Appellate Division of the First Department in the case of Keim v. Keim, 43 App. Div. 88, the measure of a referee's compensation in a partition suit is not to be found in the act of 1890. The court in that case said: "We have said that the special act in question took the sheriff of the county of New York out of the area of the general act. The effect of this, however, was not to deprive referees appointed to sell real property in this county of any fees. Section 3307 may still be resorted to for the purpose of ascertaining the proper allowance to a referee under section 3297. The former section no longer governs as between litigants and the sheriff, but the referee's compensation may be computed thereon quite as though the percentage specified therein had been literally embodied in section 3297."

This, we think, must be regarded as overruling the conclusion reached in Schierloh v. Schierloh, 22 Misc. Rep. 637, that the fees of a referee in an action of dower, and in Hover v. Hover, 25 Misc. Rep. 95, that the fees of a referee in an action to foreclose a mortgage where over $3,000 as earnest money upon the sale was received by him, but which he was compelled to return to the purchaser because the title proved unmarketable through a defect of parties to the record, are controlled by the New York County Sheriff's Law of 1890.

While the remarks above quoted were made in an action for partition, they must, by analogous reasoning, be held to apply to

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an action for the foreclosure of a mortgage and exclude the act of 1890. Neither does section 3307 of the Code of Civil Procedure, as above noted, apply in foreclosure sales in New York county. Lockwood v. Fox, *supra;* Code Civ. Pro., § 3308.

Moreover, it is apparent from a reading of the Act of 1890, that the Legislature did not intend to adapt the fees allowed by section 3297 of the Code of Civil Procedure to a salaried system in which the fees became primarily the property of the county and are returned to the sheriff *in part,* as an incident to his salary.

Section 17, subdivision 11, of the Act of 1890, contains the following provision: "For posting and publishing the notice of sale, selling and conveying real property in pursuance of a direction contained in a judgment, the like fees as for the same services upon the sale of real property by virtue of an execution, but where real property is sold under a judgment in an action to foreclose a mortgage the sheriff's entire compensation shall not exceed fifty dollars."

The only fees provided for the services enumerated in the beginning of the foregoing provisions are set forth in subdivisions 8 and 9 of the same section and they are as follows: For advertising real property two dollars and fifty cents where the amount of the judgment is less than one thousand dollars and five dollars in all other cases (subd. 8); for making duplicate certificates of the sale of real property, by virtue of an execution, twenty-five cents for each folio, and for drawing and executing a conveyance upon a sale of real property, five dollars, to be paid by the grantees. Subd. 9.

The act in question, however, is silent as to the following services specified in section 2 of the Act of 1869, as continued in section 1088 of the Consolidation Act, and for which compensation is therein provided, viz.: attending sale, attending and adjourning sale at the request of the plaintiff, making report of sale and paying over surplus moneys.

It was not and could not have been within the intention of the Legislature, in enacting the law under review, to deprive referees of their fees for performing these services in foreclosure actions. Such is not a fair and reasonable construction of the act in question. It should rather be inferred from these very omissions that the law-making power did not intend by enacting

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the provisions above quoted to supersede section 1088 of the Consolidation Act, which fixes the fees of the sheriff as well as of referees in such cases on sales in foreclosure actions; but only intended to affect the sheriff's fees for services rendered under a judgment other than one of foreclosure and sale.

Recourse must, therefore, be had to that part of the Consolidation Act above cited, which, as above stated, superseded section 2 of the act of 1869, and relates directly and exclusively to fees on foreclosure sales, and, therefore, governs the disposition of the questions arising with respect to the respondent's fees as referee.

It will be observed that the term "fees" is used, instead of "compensation." The distinction between these terms as well as the term "commissions" was pointed out by the chancellor in Delavan v. Payn, *supra*, and it has ever since been recognized and applied in statutes passed, and in decisions handed down subsequent to the enactment of the Revised Statutes and including the Act of 1869 as well as section 3297 of the Code of Civil Procedure. See Innes v. Purcell, *supra;* Guinivan v. Carroll, 4 Law Bull. 6; Richards v. Richards, *supra;* Hobart v. Hobart, 86 N. Y. 636; Race v. Gilbert, 102 id. 298.

Upon turning to the latter, it will be seen that provision is there made for the allowance to the referee of certain commissions when he is required to take security upon a sale or to distribute or apply or ascertain and report upon the distribution or application of any of the proceeds of the sale; but that commissions shall not be allowed upon a sum bidden by a party and applied upon that party's demand, as fixed by the judgment, without being paid to the referee except to the amount of ten dollars. Under these provisions a payment of the proceeds to the parties entitled, in accordance with their respective rights, is a "distribution" of such proceeds; and a payment upon incumbrances "applies" the sum paid thereon, so as to entitle the referee to such additional compensation by way of commissions. Race v. Gilbert, *supra.*

In the case just cited the Special Term struck out the item of commissions, and the General Term, in affirming the order, held that the referee under the circumstances above mentioned was entitled to receive the same fees as a sheriff does upon the

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sale of real estate under an execution, viz.: Three per cent. on a sum not exceeding $250 and two per cent. on the residue. The Court of Appeals, however, reversed so much of the order of the General Term as denied the right to commissions for distributing and applying as above defined.

In their note to section 3297 the commissioners say that they made the provision regulating the commissions general instead of limiting it to partition, but that the Legislature reduced the amount of the referee's commissions to one-half of the commissions of executors. Throop's Ann. Code of 1891, p. 901. It will be recalled that the provisions with respect to commissions were taken from section 4 of the Act of 1869, which, as already stated, related only to partition suits and allowed the full commissions of executors.

As above pointed out, however, a limitation upon the amount of a referee's compensation, including commissions, in an action to foreclose a mortgage, is expressly imposed by the concluding sentence of section 3297.

It will thus be observed that the first sentence of section 3297, allowing a referee appointed to sell property pursuant to a judgment in an action the same fees as those allowed to the sheriff, is not, as might appear at first blush, the only provision which is contained in the entire section for his compensation for services so rendered. On the contrary, the portions immediately following those referred to provide for commissions for moneys received, distributed or applied, as well as fees for rendering certain enumerated services, which, in an action to foreclose a mortgage, would, as seen, include the receiving of the order of sale and the posting of notices of sale, attending the sale, drawing the deed of the premises sold; attending and adjourning the sale, the making of the report of sale and the paying over of surplus moneys. Richards v. Richards, *supra;* Hobart v. Hobart, *supra;* Race v. Gilbert, *supra.*

The services last mentioned are those for which "fees" are allowed. For certain other services, viz., "to take security upon a sale, or to distribute, or apply, or ascertain and report upon the distribution or application of any of the proceeds of the sale" (§ 3297) the referee is entitled to "commissions." The "fees" are determined differently in different parts of the State; in New York county by section 1088 of the Consolidation Act

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as above shown. The "commissions" are uniform throughout the State and are determined by section 3297 of the Code.

That commissions are allowed to referees in foreclosure, as well as in partition, is obvious not only from the statement of the revisers above quoted that they had made the provisions for commissions general instead of limiting them to partition, but also from the express language of the section, as follows: "A referee's compensation, including commissions, cannot, where the sale is under a judgment in an action to foreclose a mortgage, exceed fifty dollars * * * , or in any other cause five hundred dollars."

It is equally plain, however, that the referee is not entitled to such commissions where a sale has not taken place. Walbridge v. James, *supra;* Lockwood v. Fox, *supra.*

The court, in the first cited case, adverting to the commissions of the referee in an ineffectual sale, at page 13 said: "He can have commissions only on the consummated sale. He can have commissions only on such moneys as were actually or constructively received and paid over under the decree."

This being our view of the law, the plaintiff, under the circumstances disclosed, was entitled to charge only for the following services:

For receiving and posting notices of sale	$10 00
For two attendances and adjournments of the sale at the request of the plaintiff in the foreclosure action, $3 each	6 00
Total	$16 00

The remaining question relates to the auctioneer's fees, amounting to fifteen dollars, which the plaintiff testified he paid to the auctioneer for having upon two occasions adjourned the sale. These fees were not a proper charge (Ward v. James, *supra,* 527), and it was error for the justice to allow them.

As a result of the foregoing considerations it follows the judgment must be modified by reducing the recovery for damages from sixty-five dollars to sixteen dollars, which latter sum, with the sum heretofore awarded for fees, extra costs and prospective

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fees, amounts in all to the sum of thirty-six dollars and fifteen cents damages and costs, and as so modified affirmed, but without costs of this appeal to either party as against the other.

FREEDMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment modified by reducing recovery for damages from sixty-five dollars to sixteen dollars, which latter sum, with sums heretofore awarded for fees, extra costs and prospective fees, amounts to the sum of thirty-six dollars and fifteen cents damages and costs, and as so modified affirmed, but without costs of this appeal to either party as against the other.

THE A. B. FARQUHAR COMPANY, Limited, Plaintiff, *v.* THE NEW RIVER MINERAL COMPANY, Defendant.

(Supreme Court, New York Trial Term, April, 1903.)

Sale — Vendor's election as to the manner of his performance — Vendee's option to order more goods, how lost.

An executory contract to deliver "200 to 300 tons" of pig iron, 25 tons in November "and balance as ordered within the next six months" is sufficiently performed by the delivery by the vendor of 200 tons and this under the rule that where an obligation may be performed in one of two ways the obligor has a right to elect in which way he will perform.

If the contract is to be construed as giving the vendee an option to order an additional 100 tons at the price fixed, the vendee lost its option by failing to exercise it within the six months next after the date when the contract was made.

Delay, in delivering the 200 tons, when acquiesced in by the vendee, does not extend the latter's time to exercise its option to order the additional 100 tons.

ACTION upon contract.

Sherman & Stanton (H. H. Whitman, of counsel), for plaintiff.

A. S. Gilbert, for defendant.

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HOUGHTON, J. On the 19th of October, 1898, the plaintiff wrote to the defendant's sales agents with respect to the purchase of a quantity of iron, as follows: "You can enter our order for 200 to 300 tons of Ivanhoe at 10.75 for 1–X and $10.50 for 2–X, deliveries to be made within the next six months as wanted. You may ship one carload of 1–X next month."

To this order the defendant, through its agents, on the twentieth of October, replied: "We enter the order accordingly for 200 to 300 tons of 1–X or 2–X Ivanhoe pig iron, at $10.75 for 1–X and $10.50 for 2–X delivered f. o. b. cars. P. R. R. at York, Pa. Terms, cash for 30 days. Delivery 25 tons of 1–X in November, and balance as ordered within the next six months."

The defendant's furnace became out of repair and the last lot of the 200 tons was not delivered until December, 1899. Much correspondence was had between the parties, plaintiff urging shipment of the iron and the defendant making excuses for not complying. On December eleventh the defendant wrote the plaintiff that there were about seventeen tons due to complete the plaintiff's order on the 200 tons, there having been up to that time about 183 tons delivered. On the following day the plaintiff wrote the defendant that there was more than the seventeen tons due on the order, and that it desired a carload every ten days until the whole 300 tons which were purchased had been shipped. Correspondence passed between the parties thereafter, plaintiff claiming that he had ordered 300 tons, and the defendant insisting that only 200 tons had been ordered, and thereafter shipped only enough to make up the 200 tons, and refused to ship the additional 100 tons to make the 300. Iron had very largely advanced in price during the year, and this action is brought by the plaintiff to recover the difference between the market price and the contract price on the 100 tons which the defendant refused to furnish. The last shipment the plaintiff did not pay for, amounting to about $200, and that it is conceded the plaintiff owes, and if it recovers, that amount is to be deducted from its damages, and if it does not recover, the defendant is entitled to a judgment therefor.

The theory of the plaintiff is that it had an option on an additional 100 tons, at the price stipulated, and that it was not obliged to exercise that option until the first 200 tons had been delivered. If the plaintiff did have an option it was not in fact exercised

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until controversy arose with respect to the last shipment of the 200 tons, which took place in December, more than a year after the giving of the order.

The defendant contends, among other things, that if there was any option it must have been exercised within the six months specified, and denies that any order for 300 tons was ever given and accepted.

There is some question whether the minds of the parties ever met on the order and acceptance. It will be observed that the order was for 200 to 300 tons, deliveries to be made within the next six months as wanted. The acceptance of the order was for 200 to 300 tons, 25 tons to be delivered in November, and balance *as ordered* within the next six months. If we place a strict interpretation on the acceptance of the defendant of the order of the plaintiff, and in the defendant's language, then it is clear that it was not bound to furnish any iron not ordered within the six months succeeding October 20, 1898, and placed the burden upon the plaintiff of ordering more than the 200 tons within the time limited.

But I think the fair interpretation of the correspondence between the parties should be said to be an agreement on the part of the defendant to furnish the plaintiff 200 to 300 tons of iron at the price stipulated. If that is a true interpretation of the contract then the defendant performed its contract by furnishing the 200 tons, and is not in default for the additional 100 tons.

In Disborough v. Neilson, 3 Johns. Cas. 81, a party agreed to furnish and deliver 700 to 1,000 barrels of meal, and it was held that the election was with him alone as to whether he would furnish 700 or 1,000 barrels, and the buyer was compelled to accept the full 1,000 barrels if tendered.

In Wheeler v. Britton, 17 N. Y. Supp. 749, there was an agreement that 3,500 to 4,000 tons of ice should be furnished, and it was held that a delivery of 3,500 tons fulfilled the contract.

In Standard Sugar Refinery v. Castano, 43 Fed. Repr. 279, there was a contract for the sale of 700 to 800 tons of sugar, and it was held that the contract was fulfilled by the delivery of only 700 tons, although in the cargo was enough to make more than 800 tons.

In Small v. Quincy, 4 Maine, 497, the agreement was for the delivery of from 1,000 to 3,000 bushels of potatoes, and it was

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held that the vendor had the right to deliver any quantity he chose from 1,000 to 3,000.

In Sparkes v. Marshall, 2 Bing. (N. C.) 761, where there was an agreement to deliver from 500 to 700 bushels of oats, it was held that the delivery of 600 bushels to the common carrier fulfilled the contract and passed title to the property.

Under the contract the defendant was the obligor and it was its duty to furnish the quantity of iron contracted for by the plaintiff. It is a general rule that when an obligation may be performed in one of two ways the obligor has the right to elect in which way he will perform. As where a man agrees to pay in money or property, he can pay in either. Interpreted in this way the defendant could fulfill its contract, which it did, by delivering 200 tons.

But if the contract is to be interpreted as an option on an additional 100 tons, yet I think that the defendant must succeed because the plaintiff did not exercise its option within the six months limited by the contract.

In Topping v. Root, 5 Cow. 404, the plaintiff contracted with the defendant to deliver to him between the first of October and the first of December, 8,000 pounds of hops, the plaintiff to have the liberty of extending the quantity to 10,000 pounds upon giving reasonable notice. About the middle of October the 8,000 pounds had been delivered, and the plaintiff demanded the full 10,000 pounds and sued to recover for non-delivery. It was held that the notice was unreasonable and should have been given before the first of October.

In Sage v. Hazard, 6 Barb. 179, there was purchased a cargo of flour, provided the vessel arrived before the tenth of December, and if the vessel should not have arrived at said time the plaintiff had the option of continuing the agreement. The vessel did not arrive until the twenty-eighth of December, and on that day the plaintiff elected to continue the agreement, and the court held that he was too late, that the election should have been made immediately, or at the latest during December eleventh, after the failure of the vessel to arrive.

Applying the strict rules indicated in the above cases it is manifest that the plaintiff could not wait until the entire 200 tons was delivered and then exercise its option, if it had one, with respect to the additional 100 tons, but must have ordered the ad-

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ditional 100 tons within the six months. I do not think it changes the situation that there was delay in the delivery of the first 200 tons. This delay was acquiesced in by the plaintiff, and the correspondence shows that the defendant was doing as well as it could to fill the plaintiff's order with those of its other customers, in view of its misfortunes. The price of iron was steadily advancing from the making of the contract, and if the plaintiff desired to avail itself of the additional 100 tons it should have taken the precaution of exercising its option, and ordered the same from the defendant within the period prescribed.

The defendant raises the point that the plaintiff elected to hold the sales agents of the defendant instead of the defendant itself, after knowledge that the defendant was the real party to the contract. If I am right in the foregoing conclusions, it is unnecessary in disposing of the case to pass upon that question.

The balance owing by the plaintiff on the 200 tons is conceded to be $212.95, which is set up as a counterclaim in the defendant's answer. The defendant is entitled to judgment for that amount, with interest from January 15, 1900, with costs.

Let a decision be prepared accordingly.

Judgment for defendant, with costs.

GEORGE E. BANNISTER, Plaintiff, *v.* THE CITY OF NEW YORK, Defendant.

(Supreme Court, New York Trial Term, April, 1903.)

New York city — Reasonable curtailment of the time of a laborer in department of highways — Acquiescence.

An assistant foreman of street repairing in a borough of the city of New York, appointed to his position from the civil service list and who is paid wages for his work, cannot, after being with others put on three-quarters time for about nineteen weeks by the city department of highways because its annual appropriation would otherwise have been exhausted, recover of the city for the quarter days he was laid off, as such a curtailment of his day's labor is not unreasonable under the circumstances, and is within the power of the head of the department notwithstanding the provisions of the Civil Service Law.

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Where he weekly signs, by making his mark, a payroll whose heading states that the payment is in full, and where he understands that he is being paid for all the work he has done, he must be deemed to have acquiesced in the reduction of his time whether or not he knew the tenor of such heading and although he protested against the reduction when the order was promulgated.

ACTION for salary.

L. & A. U. Zinke, for plaintiff.

George L. Rives, Corporation Counsel (E. J. McGuire and Arthur Sweeny, of counsel), defendant.

HOUGHTON, J. In August, 1900, the plaintiff was in the employ of the city through the bureau of highways, as assistant foreman of street repairing in the borough of The Bronx, at a fixed rate of wages of three dollars per day, having received his appointment through the proper officer, from the civil service list.

The heads of the department of highways, in July, determined that unless some economy was practiced in the administration of the department the appropriation made by the board of estimate for the year would be exhausted. Upon the recommendation of the superintendent, the commissioner of highways issued orders that the labor forces in the bureau of highways for the borough of The Bronx be placed, on the third of August, on three-quarters time. This order went into effect on that day and continued in force until the fifteenth of December following. The order was read to the plaintiff and all of his men by the foreman. The three-quarters time was brought about by direction to the men not to go to work until nine o'clock in the morning, instead of eight, and to stop one hour earlier in the afternoon.

The plaintiff brings this action to recover seventy-five cents a day for each day that he worked six hours instead of eight during the time said order was in force. If the plaintiff is entitled to recover at all it is conceded that he is entitled to recover the sum of eighty-four dollars and seventy-five cents.

At the time the order was issued, the plaintiff protested to the foreman that it was not fair to reduce the working hours, and thus prevent him from earning his full three dollars per day. He stated to the foreman that he was ready and willing to work the

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prohibited time, and I think it is fair to say that he held himself in readiness to perform a full day's work. He continued, however, to work at the reduced time, and turned in his account each week for the time which he actually worked, and at the end of each week signed a pay-roll which stipulated that he had received his wages in full. The plaintiff described the manner in which this pay-roll was signed, and the wages received, and says that he had no opportunity to see what the pay-rolls contained, and that he merely touched the pen as he passed by the paymaster, assuming that he was signing his name for the money which he actually received. He did, however, receive pay for the full time which he had worked. The plaintiff knew that it was the custom of the department to pay for only such time as a man worked, and he had not theretofore received wages for rainy days when the men did not work, or for times in which he did not report by reason of sickness or vacation.

The plaintiff does not claim that his position was an office to which a salary of three dollars a day was attached, and which he was entitled to whether he worked or not. His contention is that he having been appointed from the civil service list, that by operation of the Civil Service Law, although his superiors had the right to discharge him, they had no right to suspend him, and that for such time as he was suspended without discharge he has the right to compensation. Counsel for the plaintiff by an elaborate and ingenious brief seeks to demonstrate that the object of the Civil Service Law would be frustrated by conceding any power of suspension to the heads of departments, and insists that the facts proved by him on the trial bring the case squarely within the principles laid down in Driscoll v. City of New York, 78 App. Div. 52. I do not think that case compels a finding in plaintiff's favor. It is true that the head of the highway department could not arbitrarily suspend the plaintiff and nullify the policy of the Civil Service Law by limiting his employment to an hour a day, or half an hour a day, and thus render his position on the civil service list a burden rather than a benefit. The decisions are all careful to limit the power of heads of departments to *arbitrary* suspension. There may be employees on the civil service list engaged in outdoor work which cannot be performed in rainy weather, or freezing weather. Must it be said that an ordinary day laborer must be paid for days on which he cannot

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work and does no work, simply because he is on the civil service list, and that the city to escape payment must discharge him from day to day, and cannot suspend until the weather becomes suitable for him to perform his work? I think that the Civil Service Law is not to be interpreted so harshly against the employer. If it is reasonable to suspend a laborer when he cannot work by reason of the weather, is it not also reasonable to suspend him for a reasonable part of a day because there are not sufficient funds to keep him employed on full time, or because the exigency of repairs or construction do not demand a full day's labor?

It is the arbitrary and nullifying act on the part of the heads of departments towards men employed under the Civil Service Law that the courts will protect the employee against, and not, I think, the reasonable and fair exercise of the power of regulating work for the best interests of the municipality and of the laborer as well. An unreasonable curtailment of a day's work, or a curtailment which runs an unreasonable length of time, the courts will protect the employee against. As well, I think, the court should protect the employer in the exercise of the reasonable prosecution of his work, and temporary suspension for any reasonable cause. In the present case it was considered necessary for the city, on account of lack of funds, to put the force in the borough of The Bronx on three-quarters time; and it was considered also better for the men to be employed three-quarters of the time than to discharge them and let them have no employment at all.

But if the Civil Service Law will not permit of this construction, still the plaintiff cannot recover because he acquiesced in the situation. He acquiesced in the reduction of time and took his pay from week to week on that basis. I do not think it is important whether the plaintiff knew the heading to the pay-roll which he signed each week or not. He knew that he was receiving his pay for the services performed by him for the preceding week. Where the payment of wages or rent is made from week to week, or month to month, the law raises a presumption not only that it is in full but that all previous payments have been made. In addition to this the plaintiff continued to work at the reduced time from day to day after being notified that three-quarters time was all he would be permitted to labor. It is true that he protested against it, and said that it was not

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fair, but still he accepted the situation and acquiesced in the action of the commissioner by continuing in the employment. His superior had the right to assume by his acts that he acquiesced in the order for reduced time, and, as is said in the Driscoll case, thus put the city in the position of being unable, through the commissioner, to exercise that right which the commissioner had of discharging him instead of retaining him in employment, and thereby estopped himself from recovering against the city because by his acquiescence he prevented the city from exercising the right which the commissioner had of discharging him.

The complaint must be dismissed, with costs.

Complaint dismissed, with costs.

HANS K. FROST, Plaintiff, *v.* THERESA REINACH, Defendant.

(Supreme Court, New York Special Term, April, 1903.)

Reference — To determine an attorney's compensation upon a substitution — Costs — Practice where the justice goes out of office.

A reference, to determine what compensation should be given the attorney in an action, ordered upon a motion for the substitution of a new attorney, is one merely for the referee to take testimony and report his opinion, in aid of the conscience of the court.

The referee has no power to give the original attorney costs against his client; and where there are no costs there can be no extra allowance.

The motion remains before the court, and where the justice who heard the motion goes out of office pending the reference, it is proper practice for the original attorney, or his counsel, to bring the matter again before the court by moving to confirm the referee's report in his favor.

MOTION to confirm a referee's report and for an extra allowance.

Samuel D. Levy, for motion.

H. M. Levin, opposed.

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GILDERSLEEVE, J. In the case at bar a motion was made for the substitution of another attorney for the defendant in place of Mr. Sigmund Feuchtwanger, who was then attorney of record for the defendant Theresa Reinach, in an action brought against her by Hans K. Frost. The motion was granted upon payment to Mr. Feuchtwanger for his services, and the justice made an order referring the matter to Mr. H. W. Bridges to "determine the value" of such services, and the order provided that "on the confirmation of the referee's report and the payment by defendant to said Feuchtwanger of the amount reported due to him, the substitution is to be made, otherwise the motion is denied." Instead of conducting his own case before the referee Mr. Feuchtwanger retained Mr. Samuel D. Levy to represent him. The referee took testimony and made a report awarding a "judgment for $195, together with costs and expenses of the reference," against the defendant. Mr. Levy now moves to "confirm the report and for an extra allowance." Upon a motion for the substitution of attorneys in a pending action, a reference, ordered to ascertain the amount of the attorney's lien, although in form it may be one to hear and determine the matters in difference, is, in fact, one to take evidence and report to the court, so that it may be enabled to fix the amount of the lien. Dean v. Driggs, 82 Hun, 561. The court, upon a practice motion, has no power to order a reference to hear and determine, but can only direct a referee to take testimony and report with his opinion thereon. Matter of Lord, 81 Hun, 590. The reference in the case at bar was, therefore, not a reference to hear and determine, but one in aid of the conscience of the court. The report of the referee is in nowise binding on the court, who can accept or reject the conclusions of the referee, as the court may see fit. Marshall v. Meech, 51 N. Y. 140. The referee cannot determine the competency of evidence, but must take what is offered and leave the question of competency to the court. Scott v. Williams, 23 How. Pr. 393. The referee was absolutely without power to grant costs against defendant in favor of Mr. Feuchtwanger. The only authority or duty of the referee was to take testimony concerning the value of the lien of Mr. Feuchtwanger and report the same, with his opinion thereon. So far as the motion for an extra allowance is concerned, it is well settled that no allowance can be given where no costs are allowed in favor of the party

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asking such allowance. Jordan v. Hess, 54 N. Y. St. Repr. 326. So far as the conclusions of the referee as to the value of the services of Mr. Feuchtwanger are concerned I think the amount allowed is excessive. It appears that practically all the services consisted in making a motion to compel the disclosure of the residence of the plaintiff, and in making a motion for security for costs and in preparing the answer. For this work the referee allows a value of $225, of which $30 have been already paid. I think the sum of $100, in addition to the $30 already paid, is sufficient for the services rendered in the action by Mr. Feuchtwanger for the defendant. Ordinarily where a reference in aid of the conscience of the court has been ordered, to take testimony and report concerning facts in dispute upon a motion pending before the court, it is not necessary to present exceptions to the report in order to contest the accuracy of the referee's findings (Martin v. Hodges, 45 Hun, 38), nor to make a formal motion to confirm the report. The motion, on which the reference was ordered, technically speaking, remains pending before the court until the return of the testimony and report; whereupon the court, with the additional light thus thrown upon the question, proceeds to determine the original motion. In the case at bar the justice, before whom the motion for substitution was made, went out of office before the return of the testimony and report as to the value of the attorney's services; and the powers of a judge, with respect to actions or proceedings or motions pending before the court, terminate when he ceases to be a judge. Matter of Mayor, 139 N. Y. 140, affg. 69 Hun, 270. As we have seen, the order already entered on this motion grants the motion, but leaves the amount of the sum to be paid, as a condition for granting the same, still to be determined. Under such circumstances the course pursued by Mr. Levy, in moving for a confirmation of the referee's report, seems to be the proper practice in order to bring the matter again before the court, especially as that is the course indicated in the order of Mr. Justice Steckler. No costs or extra allowance can be allowed, as I have indicated above. Nor do I allow, under the circumstances, any costs of the motion. The reference appears to have been prolonged to an unnecessary extent, and the resulting expenses are unduly large. The order of Mr. Justice Steckler does not provide by whom these expenses shall be borne.

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It does not seem just that the defendant should pay an unnecessarily large bill for the expenses of the reference, in addition to the full value of the attorney's services, for the privilege of changing her attorney. Still the delay and procrastination of the reference seem to have been as much the fault of one party to such reference as of the other. The question as to the proportion in which the expenses should be borne may be decided upon the settlement of the order, which shall be on two days' notice and upon memoranda handed up by the respective counsel.

Ordered accordingly.

JACOB OWEN, Plaintiff, *v.* JOHN N. PARTRIDGE, as Commissioner of Police of the City of New York, Defendant.

(Supreme Court, New York Special Term, April, 1903.)

Mandatory injunction — To restrain a police department from exhibiting or publishing the photograph and measurements of a suspected criminal — Right of privacy — Libel.

Mandatory injunctions are rarely allowed on an interlocutory application and then only in extreme cases where the right thereto is established with indisputable clearness and where the final result may otherwise fail to afford complete relief.

A person, arrested by the police force of New York city upon suspicion of having committed a crime and whose photograph and Bertillon measurements were then taken by the department, cannot have it ordered by mandatory injunction to destroy or surrender the negative, all copies, and the record of the measurements.

He cannot have the department restrained from exhibiting or publishing them upon the ground that a trespass was committed against him when he was compelled to sit for his photograph, as that trespass is past.

He cannot have such relief upon the ground that his right of privacy has been invaded, for no such right exists in the State of New York.

Injury to his character and reputation constitutes nothing more than a libel and the publication of a libel cannot be restrained by injunction.

His remedy, if any, is at law.

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APPLICATION for an injunction *pendente lite.*

Steuer, Hoffman & Wahle, for plaintiff.

George L. Rives, Corporation Counsel, for defendant.

LEVENTRITT, J. This is an application for an injunction *pendente lite* to restrain the defendant from in anywise publishing the photograph and certain memoranda concerning the appearance or measurements of the plaintiff and for a mandatory direction that the negative of such likeness, together with all copies and reproductions of it and the memoranda be destroyed or surrendered to the plaintiff.

The material facts are as follows:

The plaintiff is a naturalized citizen. On May 10, 1899, he was arrested by a detective-sergeant of the police department, acting under the direction of a superior officer, as he arrived at the pier of an incoming transatlantic steamship. He was arrested without warrant or other written authority, but merely "on suspicion of being implicated in the larceny of $1,200" from a passenger on a European steamer proceeding to England. He was taken to police headquarters, searched and a note for $1,200 made by the passenger was found on his person. Then he was photographed, and certain measurements of his person and his weight were taken for preservation in what is known as the Bertillon bureau of the police department. The following morning he was arraigned before a police magistrate and discharged, the officer being unable to produce the passenger to make a complaint, being himself unable to do so and there being no evidence to submit to the magistrate that the prisoner had committed a crime.

Upon being liberated, he went to police headquarters and demanded of the then head of the detective bureau the destruction of the photograph and the measurements. That officer makes affidavit admitting a request, and a promise on his part to comply, if certain statements made by the relator should prove to be true. The photograph and measurements were, however, not destroyed for the reason, as stated by the officer in his affidavit, that "on investigation I learned that he was a man of bad character and known to the officers of European steamers as a card sharp." The plaintiff swears that he was under the belief that the photograph

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and measurements had been destroyed until December 22, 1902, when a statement appeared in the newspapers that his picture was contained in the rogues' gallery. It appears that the following circumstances led to this publication. On December 21, 1902, the detective bureau was notified by the Cunard Steamship Company that one of the passengers on an incoming steamship had been swindled and cheated at cards out of the sum of £314 sterling, by two men, one of whom traveled under the name of Joseph Cohen, and who was so designated on the passenger list. Cohen had left the dock before an officer could apprehend him. Investigation showed that Cohen was Jacob Owen, the passenger identifying him from his picture in the rogues' gallery. Cohen or Owen's companion was arrested, but was discharged, the magistrate stating that the offense having been committed on the high seas, he had no jurisdiction of the case.

After the newspaper publication referred to, the plaintiff made formal demand, in writing, of the defendant for the removal and destruction of his photograph and measurements. This was refused and hence this suit.

Several affidavits are submitted as to the plaintiff's reputation. The detective-officer who made the arrest in 1899 swears that he had known the relator for five or six years theretofore, and alleges "of my own knowledge that his associates are of the worst sort, cheats and gamblers and disreputable people of both sexes, and I was informed and verily believe that he has no occupation, and he is known as a cheap cheating gambler on all the European steamers."

Another detective-officer makes affidavit "that the said Jacob Owen is constantly crossing to England and the Continent with no object in view save that of playing of cards with his fellow-passengers and cheating them."

The plaintiff denies these and all similar allegations, and avers that he is of good moral character, that he has never been convicted and never arrested with the exception of the one instance hereinbefore referred to.

The plaintiff also avers that the so-called rogues' gallery contains only the pictures of persons who have been convicted of crime, and who are considered persistent, dangerous or habitual criminals; that the portraits and measurements are bound in book form and widely circulated in this country and in Europe. It

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appears, however, from the affidavit of one of the detective-officers who has to do with the gallery, that it contains, also, the pictures of persons who have been charged with crime and who bear bad reputations in the community; that the gallery is a private collection for the use of the detective force attached to police headquarters, and maintained to aid them in the detection and identification of criminals; that it is not open to the public; but that whenever a person presents himself at police headquarters complaining that he has been robbed or swindled, makes out a *prima facie* case, giving a description of the person who robbed or swindled him, he is permitted, in the exercise of the best judgment of those in charge of the "rogues' gallery," to make an examination to determine whether the photograph of the individual charged is in the gallery; and it is alleged that the instances are many where criminals have thus been discovered.

As to the law on this statement of facts:

Even were the plaintiff entitled to any part of the relief he asks, he could not get a mandatory direction on this preliminary application directing the destruction of the photograph and measurements. That would be the question ultimately to be determined in the action. His maximum relief now would be an injunction restraining the exhibition and publication, in any manner, of the photograph and measurements. Mandatory injunctions, granted even on final decree with caution and limitation, are allowed only with rarity on an interlocutory application, and then in extreme cases where the right is established with indisputable clearness and where the final result may otherwise fail to afford complete relief. High Inj., § 2; Kerr Inj., §§ 230, 251; 16 Am. & Eng. Encyc. of Law, 343; Close v. Flesher, 8 Misc. Rep. 299; Ward v. Kelsey, 14 Abb. Pr. 106.

The question then becomes, can the plaintiff, on the facts disclosed, secure even partial or limited relief by way of injunction, or, more broadly stated, can the plaintiff, in the event of proving his facts on the trial, have, as a matter of law, any injunctive relief whatsoever, whether mandatory or preventive.

The first point to be considered is, have the plaintiff's rights been invaded?

The acts of the defendant's predecessor in office, so far as this plaintiff is concerned, and the defendant's continuance of them by preserving, exhibiting or circulating the photograph and meas-

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urements, can obviously be justified only as an exercise of the police power. The duty of the police, always existing, and reaffirmed by the charter (§ 315) to "preserve the public peace, prevent crime, detect and arrest offenders," gives them necessarily a wide range of incidental powers to accomplish the mandate of the statute. The existence of the so-called "rogues' gallery," and the taking of photographs, weights and measurements, finds its authority, if anywhere, in this provision, or in the accepted pre-existing principles of which it is the expression. So far as habitual criminals are concerned, their supervision and control, no serious question could well be raised as to the propriety or legal character of the acts involved. One of the phases of police supervision, says Professor Tiedeman in his State and Federal Control of Persons and Property, "is that of photographing alleged criminals and sending copies of the photograph to all the detective bureaus. If this is directed by the law as a punishment for crime of which the criminal stands convicted, or if the man is in fact a criminal, and the photograph is obtained without force or compulsion, there can be no constitutional or legal objection to the act, for no right has been violated." The taking of photographs in such cases has authority to support it. People ex rel. Joyce v. York, 27 Misc. Rep. 658; State ex rel. Bruns v. Clausmeier, 154 Ind. 599. It is a well-known fact, however, and admitted by the defendant, that the rogues' gallery contains, as well, the photographs of persons merely suspected of crime. How far this may be justified as a police measure may be a question not easy of solution. Professor Tiedeman intimates that where the suspicion is well founded the right exists. 1 Tiedeman, *supra*, 157, 158. But what is a well-founded suspicion? Where the person photographed is not a habitual criminal, or has never been convicted of crime so that preventive measures might be justified, or where the suspicion, directed to a particular case, has not sufficient legal basis in fact to warrant some criminal proceeding — the definition of a "suspicious person" becomes vague and shadowy, varying with the circumstances of each case, and measures like those under consideration may approach dangerously near an arbitrary interference with personal rights. In this case the arrest has nothing but suspicion to support it, and were it necessary to inquire into the foundation of the suspicion, it would, on the facts disclosed, be found to rest on hearsay merely. The sworn statement of

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several detectives that the plaintiff was known to them for years as a common cheat and gambler, as an associate of criminals and disreputable persons, without the disclosure of any fact showing the source of such knowledge, can hardly be deemed sufficient.

In the view that I take of this application, however, I do not deem it necessary to examine further the by no means clear question of the right to take for police purposes the photograph of a person merely suspected of crime. Conceding, but not in any wise deciding, that there is no such right, and conceding, further, again without deciding, that even if there is such a right, the defendant fails to bring himself within the facts permitting its exercise, I am of the opinion that the plaintiff has mistaken his remedy. In other words, conceding that the plaintiff's rights have been invaded, he cannot seek redress for the violation by means of an injunction action.

It is argued on behalf of the plaintiff that a trespass had been committed against him; that a so-called right of privacy has been invaded; that there has been an injury to his character and reputation, and that, as all these wrongs are continuing, he is entitled to injunctive relief.

The only trespass apparent is one that may have been committed in the first instance against his right of personal security, if he was compelled, against his will, to sit for his photograph. That injury, however, is not, nor has it been, continuing. That is past and done and cannot be enjoined. In effect, the plaintiff's position is that the other injuries which he claims have followed from that as its source. The relief he seeks is not for the alleged unlawful taking of the photograph, but for its alleged unlawful preservation and publication.

This brings us then, to a consideration of his second claim, which is, in effect, that his right of privacy has been invaded.

After some vacillation, rather by way of *dictum* than decided principle, our Court of Appeals has finally repudiated the doctrine that the right of privacy has any existence in law or is enforceable in equity. Roberson v. Rochester Folding Box Co., 171 N. Y. 538.

"The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written

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up for the benefit of others, or his eccentricities commented upon either in handbills, periodicals, or newspapers * * *. If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result, not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness but must necessarily embrace as well the publication of a word-picture, a comment upon one's looks, conduct, domestic relations or habits."

After examining the history of the phrase "right of privacy" and discussing the cases, directly and indirectly bearing upon it, the court concludes: "An examination of the authorities leads us to the conclusion that the so-called 'right of privacy' has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided" (p. 556).

In view of this authoritative pronouncement it would be purposeless to base any argument or relief on the right of privacy. It is settled, for this State at least, that any invasion of one's right to be let alone can be remedied only by a statutory enactment directed against the particular case. The facts in Roberson v. Rochester Folding Box Co., *supra*, showed a peculiarly aggravated case in the absolutely unauthorized publication and circulation of an easily recognizable likeness of a reputable young woman as part of an advertisement, spread broadcast, for a brand of flour. Injunctive relief was denied.

An examination of the authorities, relied on by the plaintiff on this branch of the case, will show that they are based either on *dicta* or on principles directly overruled or disapproved in the Roberson case.

Thus Schuyler v. Curtis, 147 N. Y. 442, while containing *dicta* tending to support the plaintiff's position, in reality proceeded upon the principle that, even if the right of privacy existed, it did not survive the death of the person to the perpetuation of whose memory it was sought to erect a statue. The *dicta* were considered and rejected in the Roberson case. So far as the plaintiff relies on the opinions of the lower courts in the Schuyler

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case, these are, in view of the reversal of the decisions below, not pertinent. Marks v. Jaffa, 6 Misc. Rep. 290, was a case based on the decision below of the Schuyler case, which was reversed above.

We are brought then to the question of the injury to the plaintiff's character and reputation. But this is a libel and nothing more (1 Tiedeman, *supra*, 157; People ex rel. Joyce v. York, *supra;* State ex rel. Bruns v. Clausmeier, *supra*), and the publication of a libel cannot be restrained by injunction. Marlin Fire Arms Co. v. Shields, 171 N. Y. 384; De Wick v. Dobson, 18 App. Div. 399; New York Juvenile Asylum v. Roosevelt, 7 Daly, 189; Brandreth v. Lance, 8 Paige, 24; Kidd v. Horry, 28 Fed. Repr. 773; Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69; Singer Mfg. Co. v. Domestic S. M. Co., 49 Ga. 70; Townsh. Sland. & Lib., § 417a, *et seq.;* Odger Lib. & Sland., *13–16.

"No injunction can be obtained," says Mr. Odger, "to prohibit the publication or republication of any libel or restrain its sale." In the early case of Brandreth v. Lance, *supra*, the rule was announced that to restrain the publication of a libel by injunction would be an infringement upon the liberty of the press and an attempted exercise of the power of preventive justice which the Legislature had decided could not safely be entrusted to any tribunal consistently with the principle of a free government; and most recently in Marlin Fire Arms Co. v. Shields, *supra*, our Court of Appeals bases its argument in part, upon the constitutional guaranty of freedom of speech and press, arguing against equitable interference by showing how the party charged could thereby be punished and deprived of his liberty without trial by jury.

The language in Brandreth v. Lance that: "The utmost extent to which the court of chancery has ever gone in restraining any publication by injunction, has been upon the principle of protecting the rights of property" is law to-day.

In Marlin Fire Arms Co. v. Shields, 68 App. Div. 91, it was sought to sustain the injunction on the claim that property rights were involved, but it was expressly recognized that: "Where the injury is purely personal, like an attack upon character and reputation, equity * * * has uniformly declined to entertain jurisdiction." The Court of Appeals, reversing, held that there was no precedent in the courts of this State for equitable interference.

I must so hold in this case. The English authorities referred

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to in the brief are distinguished in Kidd v. Horry, *supra* (followed in De Wick v. Dobson, *supra*), where it is shown that they are based on specific acts of Parliament which have no counterpart in the legislative enactments here.

The plaintiff's sole injury, if any, has been to his character and reputation. Though he may have suffered wrong and the injury be irreparable, equity, as administered in this State, can give him no relief, but he must seek his remedy at law.

The motion for a preliminary injunction must be denied, with ten dollars costs.

Motion denied, with ten dollars costs.

Matter of the Petition of PATRICK W. CULLINAN, as State Commissioner of Excise, for an Order Revoking and Cancelling Liquor Tax Certificate No. 6,678, Issued to EDWARD P. LEHR.

(Supreme Court, New York Special Term, April, 1903.)

Liquor Tax Law — Revocation of certificate — Unconstitutionality of section 28, subdivision 2, as amended in 1901 — Petition.

The provisions of the Liquor Tax Law (L. 1896, ch. 112, § 28, subd. 2, as amd. L. 1901, ch. 640, § 5) authorizing the justice, judge or court, on the return day of the order to show cause, to cancel the certificate unless the holder, if duly served, then files a verified answer denying all the violations alleged, are unconstitutional.

Where, therefore, the certificate holder attacks the constitutionality of the statute on the return day and refuses to file a verified answer, the court cannot take testimony or appoint a referee and will not cancel the certificate.

A petition for revocation, made on information and belief, setting forth the statutory allegations and having annexed to it the affidavits of two persons minutely stating the violations of the statute and as upon personal knowledge, is sufficient to confer jurisdiction upon the court.

APPLICATION to revoke and cancel a liquor tax certificate.

The petitioner alleges, upon information and belief, that on

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Sunday, the 23d day of November, 1902, the holder of said liquor tax certificate, Edward P. Lehr, personally and by his agents, servants, bartenders, etc., etc., at the place designated in said certificate, viz., premises No. 955 Amsterdam avenue, New York city, did wrongfully and unlawfully have open and unlocked a door and entrance from the street, alley, yard, hallway and adjoining premises to the room where liquors were sold and kept for sale, when it was not necessary for the ingress or egress of himself, etc., and did admit and allow to remain in such room persons not members of his family, etc., to wit: Andrew Frank, George Seim, Charles A. Donnelly, Benjamin G. Halsey, etc.

Fifth. That two glasses of whiskey were sold, one to Andrew Frank and one to George Seim — which were paid for and drunk on the premises.

Sixth. That two glasses of whiskey were sold to Charles A. Donnelly and Benjamin G. Halsey on the same day.

Seventh. That liquor was sold to unknown on same day.

The certificate holder refused to answer on the ground of constitutional privilege.

William G. Van Loon, for petitioner.

Ford & Tuttle, for certificate holder.

McCall, J. This is an application to revoke and cancel a liquor tax certificate, and the proceeding is instituted under the provisions of section 28 of chapter 112 of the Laws of 1896, known as the "Liquor Tax Law," as the same has been amended by chapter 312, Laws of 1897, as amended by chapter 367, Laws of 1900, as amended by chapter 640 of the Laws of 1901. Before the enactment of these several amendments, in order to institute this proceeding, "Any citizen of the state" could "present a verified petition to a justice of the supreme court or a special term of the supreme court, of the judicial district in which such traffic in liquors is authorized to be carried on, or in which the holder of such certificate resides," etc. The petition contains certain allegations specifically enumerated in the act, and then follows this significant clause: "Such petition shall state the facts upon which such allegations are based." The subsequent procedure

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under the original act was for the justice or court to whom the petition had been presented to grant an order directing the holder of the certificate and the officer who granted the same to appear before him or a Special Term of the court at a time designated in the order and on the return day: "To hear the proofs of the parties," and if the court deemed it necessary to "order a reference to take testimony in relation to the allegations of the petitions." The act further provided: "If the justice or court is satisfied * * * an order shall be granted revoking and cancelling such certificate." Under the amendments made by chapter 312, Laws 1897, section 28 of the original act was divided, and subdivision 2 was created, and the material changes in the provisions in so far as they affect the case at bar were, that additional reasons were prescribed upon which the proceeding could be instituted, and the petitioner might allege that the certificate holder "was not entitled to receive or is not entitled on account of the violation of any provisions of this law, conviction for which would cause a forfeiture of this certificate, or for any other reason to hold such certificate;" and further providing that the "order of the court should contain an injunction restraining the certificate holder from transferring or surrendering such certificate," etc. The amendments made by chapter 640, Laws 1901, provided that the petition in these proceedings should be made by the State Commissioner of Excise or his deputy, and by no one else unless the consent of said commissioner was indorsed upon the petition. And the procedure on the return day of the order was materially changed, and in the place and stead of that originally designated was substituted the following: "On the day specified in such order, the justice, judge or court before whom the same is returnable shall grant such order revoking and cancelling the said liquor tax certificate, unless the holder of said liquor tax certificate shall present and file a verified answer to said petition, which answer denies each and every violation of the liquor tax law alleged in the petition, and raises an issue as to any of the facts material to the granting of such an order, in which event the said justice, judge or court shall hear the proofs of the parties and may, if deemed necessary or proper, take testimony in relation to the allegations of the petition or answer, or appoint a referee to take proofs." All through these several stages of amendment the law remained that "Such petition shall state the facts upon which the

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application is based." Heretofore in these proceedings it was the custom to simply present a verified petition in which the allegations were made upon information and belief, and thereupon an order would issue directed to the parties involved to show cause, etc., upon a return day fixed in the order observing the time limitation of the statute, and it has been assumed that such a petition was all that was necessary to allow the court to acquire jurisdiction. In June, 1901, the case of Matter of Peck v. Cargill, 167 N. Y. 392, was decided by the Court of Appeals, Judge O'Brien writing, whereby it was determined that the court could not acquire jurisdiction by such a petition, that it did not meet the requirements of the statute, and the opinion animadverts very severely upon the procedure adopted in that case, and the result was that the order made at Special Term, revoking the license, was reversed and the proceedings dismissed. But the decision, it seems to me, went far beyond the question of jurisdictional defect presented by the record. It took up, discussed and disposed of subdivision 2 of section 28 of this act, as amended by section 640, Laws 1901, and clearly and unquestionably declared it to be unconstitutional. The opinion in Matter of Cullinan (Micha certificate), 76 App. Div. 362, urged so strongly by the petitioner in the case at bar, does not seem to me to be hostile to this view, but rather, in my judgment, upholds it. In the Micha case the certificate holder put in a verified answer as the statute provided, and sought on the appeal to invoke for his protection a constitutional provision he had waived on the hearing. And the Appellate Court rightfully held that he was not in a position, under the circumstances, to test the constitutionality of the act. In the case at bar, the holder of the certificate attacked the constitutionality of the act on the hearing and refused to put in a verified answer, and under such circumstances, the court, in the Micha case, "agreeing that there is an element of unconstitutionality in the statute," would have been compelled to have sustained him. But there is one important phase in this type of proceeding which the doctrine in the Micha case (it having been affirmed in the Court of Appeals) controls, to wit, the sufficiency of petition in order to have the court acquire jurisdiction. The Court of Appeals in Matter of Peck v. Cargill, *supra,* having disclosed and pointed out the defects in former proceedings, the commissioner of excise in the Micha case sought to remedy them, and he supported his

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petition in that case, as he does also in the case at bar, by supplying two affidavits, which state the facts complained of positively upon oath, and these affidavits are made part of the petition, and as Justice Woodward said in the Micha case, "This is, it seems to us, a full compliance with the provisions of the statute," which throughout has always provided "that such petition shall state the facts upon which such application is based." Therefore, the court has unquestionably attained jurisdiction over the case at bar, and it must be disposed of under the provisions of this act as it stands amended. On the return day the petitioner, the State Commissioner of Excise, presented his verified petition, in which the allegations called for by the statute were duly made, but all asserted upon information and belief. In support, and as a part thereof, the petitioner submitted the affidavits of Andrew Frank and Charles A. Donnelly, both special agents of the commissioner, in which the affiants state minutely the facts upon which the petition is based, and swear from personal knowledge that the Liquor Tax Law was violated, specifically stating the said violations. The holder of the certificate appeared through counsel, attacked the constitutionality of the section of the act under which the proceeding had been taken and refused to file a verified answer as called for by the statute. No proof or testimony was adduced, no witnesses offered by either side, and the only record before the court is the petition of the State Commissioner of Excise, of which these affidavits referred to are a part. I am of the opinion that the refusal of the certificate holder Lehr to file a verified answer was wholly justifiable, and that he was clearly within his constitutional rights. The Legislature has not the power to enact such legislation as is found in this subdivision 2, section 28, of this act, as amended, for the reasons so clearly and forcibly advanced in the opinion of Judge O'Brien in Matter of Peck v. Cargill, *supra,* and when the certificate holder refused to file such answer, in my judgment, the court (if the legislation were sound) had no alternative but to act upon the default and revoke and cancel the license. It could not, under the terms of this act, as amended by section 640, Laws of 1901, take proof or testimony or appoint a referee. It is not now (as the act originally provided) within the power of the court, on the return day without qualification of any kind, "to take proof," etc., but under this amendment "the justice or the court must revoke and cancel

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on default, or must wait till the issues are joined by the filing of the verified answer. * * * In which event " the court or judge may take proof, etc. In this case there had been a default by a refusal to file a verified answer. The certificate holder claiming his constitutional privilege, I cannot proceed to take proof or direct a reference, and I shall not revoke or cancel, for the reason that the section of the statute calling for this procedure is unconstitutional.

Motion denied. Ten dollars costs.

The People ex rel. WILLIAM L. HATCH, Relator, *v.* FRANCIS J. LANTRY, as Commissioner of Correction of the City of New York, Respondent.

(Supreme Court, New York Special Term, April, 1903.)

Abatement — When a mandamus proceeding against a city official does not abate with his term — Substitution of successor.

A proceeding taken, by an alternative writ of mandamus, by an employee of a city department to procure his reinstatement by the head of the department, after an alleged illegal removal, does not abate when the head of the department goes out of office.

His official successor need not be substituted as defendant, but it is better practice that he be substituted.

APPLICATION for a writ of mandamus.

James C. Smith (Thomas F. Keogh, of counsel), for relator.

George L. Rives, Corporation Counsel, for defendant.

MCCALL, J. In this case an alternative writ of mandamus was granted against Francis J. Lantry, as commissioner of correction in the city of New York, upon the application of the relator, who asserted that he had been illegally removed from his office as supervising engineer in the department of correction of the city of New York. Since the issuance of said writ, Commissioner Lantry has retired from and has been succeeded in office by Thomas W. Hynes, and the relator deeming it necessary, as he

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believes and asserts, under the decision of the Court of Appeals in the case of the People ex rel. Broderick v. Morton, 156 N. Y. 136, seeks by this motion to substitute for Commissioner Lantry, respondent, who has retired from office, Commissioner Hynes, the present incumbent. The question involved herein, to wit, that upon the retirement of Commissioner Lantry the proceeding abated, and that it cannot be continued against Commissioner Hynes, is one that is not by any means free from doubt, owing to the principles announced in People ex rel. Broderick v. Morton, *supra*, which has seemingly established the law to be that an alternative writ of mandamus cannot be prosecuted after the term of office of the respondent had expired, in a case where the delinquency charged is personal, and does not involve a claim against the State or municipality. But since that decision was rendered, an opinion has been handed down in the case of People ex rel. Cunliffe v. Cram, 30 Misc. Rep. 561, wherein the facts are almost identical with those of the case at bar, which squarely took up the doctrine asserted in the Broderick case, and distinguishes and differentiates the questions involved in the two cases, and holds that the Broderick case is not applicable to a case presenting the conditions of the Cunliffe case. As was forcibly said by Justice Lawrence in the Cunliffe case, which statement applies with equal force to the case at bar, that in the Broderick case the "court did not intend to apply the rule laid down to the case of the action of a municipal corporation, or one of the component parts thereof, in the appointment or removal of an officer or employee." But the conclusions reached in the Cunliffe case seem to go much further than merely holding that the rule laid down in the Broderick case as to the abatement of proceedings does not apply in cases similar to the one at bar, and practically holds that where a vacancy occurs in an office which is one of the administrative departments of the city corporation, it (the department) being a part and parcel of the corporation, it is not necessary in mandamus proceedings to substitute the successor or successors in office; in fact, it is not even necessary to give him or them actual notice of an intention to continue the proceeding, it being sufficient, in as far as notice goes, if it be requisite at all, to notify the corporation counsel, who has been in charge of the proceedings from the beginning. And this view of what is the proper practice has received the approval of the Appellate Divi-

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sion in the case of People ex rel. Melledy v. Shea, 73 App. Div. 232. Nothing in the opinion in actual words conveys the point that I would make, except that it shows that an order denying the writ of mandamus was reversed, and the application granted. An examination of the record, however, reveals that the very question involved here was brought squarely before the court on affidavit offered in opposition to the motion, which in substance stated that "the Hon. John Shea is not the commissioner of bridges at the present time, having ceased to hold office on the 31st day of December, 1901. Charles H. Knox, Alexander T. Mason and William M. Dykeman, no longer compose the civil service commission of the city of New York, the said commission having ceased to exist and their successors having been appointed in accordance with the provisions of the amended charter, which took effect January 1, 1902." Still, on the review of the order made at Special Term, with those conditions urged upon the court, the order of the Appellate Division directed "that a peremptory writ of mandamus issue," etc., commanding the "commissioners of bridges of the city of New York to make requisition upon the municipal civil service commissioners of the city of New York," etc., and commanding the municipal civil service commissioners of the city of New York "to certify a commissioner of bridges of the city of New York," etc. So it would seemingly follow that the procedure and practice sanctioned by the decision in the Cunliffe case has been approved by the Appellate Division in the Melledy case, and the conclusion in the case at bar must be that the proceeding does not abate by the retirement of Commissioner Lantry from office. On the question raised as to the mulcting of the present commissioner with costs, that is entirely within the discretion of the court on the trial of the alternative writ of mandamus, and it is safe to say that there will not be any unnecessary costs awarded. Now, while it may not be necessary to make the substitution asked for in this application, having disposed of the question of the abatement of the proceeding in favor of the relator, still, I find nothing prohibiting such procedure, and believe it to be the better practice. The motion is, therefore, granted, with ten dollars costs.

Motion granted, with ten dollars costs.

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Misc.] Surrogate's Court, New York County, April, 1903.

Matter of the Estate of JOHN D. PROBST, Deceased.

(Surrogate's Court, New York County, April, 1903.)

Transfer tax — Taxability of loans, made by a partner to his firm, constituting working capital — Profits left on deposit with the firm.

Except as between the partners themselves, money which one of them loaned to the firm, which it used, and upon which he received ratably such profits as were earned by the firm, is invested capital and as such is subject to the transfer tax upon his death.

Profits which he permitted to remain on deposit with the firm are to be deemed taxable assets of his estate.

APPEAL from an order assessing and fixing the transfer tax.

William E. Kisselburgh, Jr., for State Comptroller.

Johnson & Hess, for executor.

FITZGERALD, S. Partners may agree as between themselves that any contribution to the capital of the concern shall be regarded as a loan, but as to the rest of the world the transaction will nevertheless represent a contribution to capital. Thus, in the Matter of Reiser (19 Hun, 202, aff'd on opinion below, 81 N. Y. 629), it was held that where a firm is indebted to one of its partners and the firm becomes insolvent, such a debt can only be paid after all other creditors of the copartnership have been satisfied.

In the case at bar, therefore, an attachment might have been levied against all the capital, including that represented by the contribution by loan (so-called), and the lender or his assignee would have had to await the payment of all other partnership debts before he could secure payment. Neither the lender nor his assignee would be entitled to a preference, or even an equality, of payment with other creditors on liquidation.

The claim that this arrangement was made to avoid the payment to decedent of too great an amount of profits might be plausible if the partnership agreement were for a division of profits in proportion to nominal capital contributed. The facts

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appearing show that he got 30 per cent. of the profits, which included all profits earned by capital, whether contributed by way of loan or otherwise.

Consider the door for fraud upon the State which would be opened if such a subterfuge could be resorted to successfully. A non-resident partner might make his nominal contribution to capital say $100. He might loan the partnership the balance of his real contribution to capital and thus evade taxation. Under the law the money so loaned is, except as between the partners themselves, capital invested in the business. It is subject to the risks of the business, for it is liable to be levied on by other creditors to the exclusion of his claim. Calling the transaction a loan does not transform its character as an investment of capital. The agreement to advance this working capital was made prior to the commencement of the partnership; it was to remain in the business during the continuance of the firm; it drew interest at the same rate as the nominal capital contributed, and the profits were divided according to its ratio to the combined funds advanced by the partners. I hold that this fund was capital invested. The decision in Matter of Horn (39 Misc. Rep. 133), is, therefore, distinguishable.

With reference to the profits permitted to remain on deposit with the firm, I am of opinion that the Houdayer case (150 N. Y. 37) and the Matter of Blackstone (69 App. Div. 127, aff'd in the Court of Appeals, 171 N. Y. 682 and in the U. S. Supreme Court, N. Y. L. J., February 2, 1903, and cases cited) are authority for including the amount among the taxable assets. These profits were so much cash set apart to the account of the decedent, subject to his sight draft, payable on demand. There is no difference in principle between moneys so deposited in a bank or trust company, with or without interest. The fact that they are expressly permitted to be used in the business of the firm does not differentiate the transaction from the ordinary deposit with a bank, banker or trust company. The latter are always so employed, and it is only by such use that they can be profitably borrowed. I conclude, therefore, that the so-called loan of $281,250, and the sum of $140,131.40, representing undivided profits, should have been included among the assets of decedent and taxed.

Appeal sustained.

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Misc.] Surrogate's Court, New York County, April, 1903.

Matter of the Estate of Mary Murray or Totten, Deceased.

(Surrogate's Court, New York County, April, 1903.)

Administration — Storage of goods before probate — Unnecessary legal services.

The account of the executor of a contested will should not be surcharged with the difference between the rent of the apartment, in which his testatrix died and in which, pending the contest, he allowed her goods to remain, although he might have terminated the lease at once, and the smaller sum it would have cost him to store them in a warehouse, where it appears that the contestant alleged that the main provision of the will was void and the executor unfit to administer the estate.

An executor cannot employ counsel to perform trust duties which the executor can do without such assistance.

Motion to confirm the report of a referee.

David Thornton, for executor.

Andrew F. Murray, for objectant.

Thomas, S. While it may be true that the apartment occupied by the testatrix was held on a letting from month to month, and the executor could have effected a saving by removing the furniture to a storage warehouse before the will was proved or letters testamentary were issued to him (People ex rel. Gould v. Barker, 150 N. Y. 52), I do not think that he can, at the instance and for the benefit of the contestant, be punished for his failure to do so. The delay in the probate was caused by the contestant, who alleged that the will, or its most important provision, was void, and that the executor was unfit to administer the estate. Under such circumstances the contestant is not justified in complaining that the executor omitted to assert rights of control over the property, or to hazard a litigation with the landlord and another with him, merely for the purpose of effecting a small economy in storage charges, while his right to letters testamentary was in dispute and undetermined. The report of the referee as to this

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item is modified and the executor's account is surcharged in the sum of $22.50, being the difference between the rent for July, 1901, and the cost for storage for that month, letters having been issued to him in June.

The controversies relative to this estate have been conducted with great zeal, and the finding of the referee is that the services rendered by the attorney for the executor were reasonably worth the sums charged for them. With this finding I agree. The will was drawn by the attorney for the executor, and the residuary clause was adjudged void (34 Misc. Rep. 39). In the opinion of the referee he suggests this as a reason for striking off $150 from the attorney's fee for services in the probate proceeding. If this could be done it must be upon the ground that the executor has a valid cause of action for damages, which it was his duty to urge by way of counterclaim. If he has such a cause of action, and if it is not barred by the statute, and if it would be a proper counterclaim to a claim against the executor for services rendered to him, he has not asserted it, and no one has urged that he be punished for not doing so. The person who is now getting the larger part of the estate, and who appears as sole contestant, bases his claims on the invalidity of the will and, even if it be conceded that the attorney was in fault in preparing the instrument, he was greatly benefited by the error and is in no position to ask damages. Among the services performed and charged for by the attorney there were some which should, in strictness, have been performed by the executor himself, without professional assistance. I cannot agree with the referee in estimating the value of these services at $300. Having in mind the fact that the contestant was represented by an active and vigilant lawyer, prepared to criticise every fault, I estimate the value of the services of this class at $50. The referee's report is modified in this respect by deducting only $50 from the amount of the attorney's charges.

In all other respects the report of the referee is confirmed. Tax costs and settle decree on notice.

Decreed accordingly.

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MARY A. WINNE, Plaintiff, *v.* HERBERT WINNE, Defendant.

(Supreme Court, Albany Trial Term, April, 1903.)

Easement — Right of way — Adverse enjoyment — Presumption of a grant.

Where the owner of a tract of land, having highways on two sides of it, continuously maintains for nearly thirty years a passageway across the tract for access from his dwelling-house on the tract to the said highways, his two sons, between whom his will divided the tract, take their shares burdened with the artificial arrangements which he created, and a person claiming under the son who received the dwelling-house cannot be restrained from use of the entire passageway by a person claiming under the other son.

An uninterrupted and open enjoyment of the passageway by the defendant and his predecessors for twenty years and more raises a presumption of a grant and this presumption becomes conclusive when it is not rebutted.

ACTION for an injunction to restrain the defendant from going over the plaintiff's land and for damages.

Defense, an easement and right of way.

Upon the trial it appeared that one Francis Winne formerly owned and occupied a tract of land in the town of Bethlehem, Albany county, with a highway upon two sides of his land. That during his lifetime he maintained and used a passage or roadway leading from his dwelling-house to each of said roads; such passage or roadway being in existence prior to the year 1834.

He died in 1862, leaving a last will and testament by which he divided his tract of land into two parts, devising one part to his son Jurian and the other to his son Adam, the portion upon which was the dwelling-house occupied by Francis in his lifetime being devised to Adam.

The passage or roadway passed through each of such farms, and was used and traversed by the said Jurian and Adam Winne continuously and uninterruptedly, each using not only that portion of the passage or roadway which crossed his own farm, but also that portion which crossed the farm of the other.

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Adam sold his farm to his son, the defendant, in the year 1885. Jurian died in the year 1887, and his executor, acting under a power of sale, conveyed his farm to his widow, the plaintiff. The plaintiff and defendant, their employees and tenants, continued to use such passage or roadway uninterruptedly until September, 1902. During all these years from prior to 1834 until September, 1902, said passage or roadway was well defined, and a portion of the time fenced on both sides, but in later years only on one side. Its use by the owners and occupants of the farms through which it passed has been continuous, uninterrupted, open and notorious; and it has also been used by the neighbors having occasion to pass from one road to the other. The action is for the purpose of restraining the defendant in the use of such roadway.

Charles Irving Oliver, for plaintiff.

Bailey & Sturges (John M. Bailey, of counsel), for defendant.

HERRICK, J. The passageway in question has been in existence for a period of nearly seventy years, perhaps more; the evidence does not disclose. Whether, at the time Francis Winne, the predecessor in title to both parties in this action, acquired the property in question, such passageway existed we do not know. If it did, Francis Winne permitted its continued existence and maintained it after he acquired the several properties which constituted his farm at the time of his death; if it did not, he opened such passageway through his property nearly, if not more than, seventy years ago.

He had entire dominion and control over his farm lands, and might have arranged them at his will. No easement existed so long as the ownership of all was in him, because he might at any time rearrange the passages to and from his dwelling-house, or destroy them altogether. But the moment he chose to sell any portion thereof his right to rearrange ceased, and any purchaser taking from him took all the open, visible burdens and benefits that existed at the time of the purchase.

Where the owner of the land has, by any artificial arrangement, effected an advantage for one portion, to the burdening of the other, upon the severance of the ownership the holders of the

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two portions take them respectively charged with the servitude and entitled to the benefit openly and visibly attached at the time of the conveyance. Lampman v. Milks, 21 N. Y. 505; Simmons v. Cloonan, 81 id. 557; Paine v. Chandler, 134 id. 385; Spencer v. Kilmer, 151 id. 390.

In Paine v. Chandler, 134 N. Y. 385, it was held that when the owner of land sells and conveys a part thereof he impliedly grants to the grantee all those apparent and visible easements which at the time of the grant were used by said owner for the benefit of the part granted, and which are necessary for the reasonable use thereof, and it seems to me that the converse of that proposition is true, that when the grantee takes a title to land over and upon which there are apparent and visible easements, he takes such land subject to those easements, and the case becomes much stronger when such grantee has prior to receiving such conveyance been a participator in the use and enjoyment of such easements.

This rule applies to all artificial arrangements which openly exist at the time of the conveyance, and materially affecting the value of the premises conveyed, and is not confined to uses absolutely necessary to the enjoyment of the thing granted. Spencer v. Kilmer, 151 N. Y. 398.

Adam and Jurian Winne stood in no different or better position than purchasers of the respective farms would. They took their farms under their father's will subject to the apparent reciprocal burdens imposed upon each, as well as the apparent reciprocal benefits, and their successors in title take them with the same reciprocal benefits and burdens.

In addition to that the defendant I think has acquired a right of way by his own and the plaintiff's acts, and those of their respective predecessors in title. He and his have used and enjoyed this passageway since the year 1862 openly, notoriously and uninterruptedly; and there was at least some claim of right under the devises in the will of Francis Winne.

"An uninterrupted use and enjoyment of right of private way over the land of another for twenty years, becomes an adverse enjoyment, sufficient to raise a presumption of a grant. The use for twenty years, to be conclusive evidence of a right, must have been continuous, uninterrupted and exclusive; that is, under a claim of right, with the knowledge and acquiescence

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of the owner. The time of the enjoyment is deemed to be uninterrupted when it is continued from ancestor to heir, and from seller to buyer. * * * The use of an easement for twenty years, unexplained, will be presumed to be under a claim or assertion of right, and adverse, and not by the leave or favor of the owner." Miller v. Garlock, 8 Barb. 153; Townsend v. Bissell, 4 Hun, 297; Hinckel v. Stevens, 35 App. Div. 5; Bell v. Hayes, 60 id. 382; Hey v. Collman, 78 id. 584; Colburn v. Marsh, 68 Hun, 269; affd., 144 N. Y. 657. Approved in Fritz v. Tompkins, 168 N. Y. 524.

The case of Barnes v. Haynes, 13 Gray, 188, was the case of a passageway extending from a street, along and upon both sides of the dividing line between two lots, and was the only means of access to the back part of either. It was used uninterruptedly for twenty years by the owners of both lots, without limit, restriction, interruption or objection, or any claim of right, except what might be implied from such use. No mention of any right of way was made in any of the conveyances of either lot. It was held that from such use a grant must be presumed to the owner of each lot, an easement in that part of the passageway which was upon the other lot. The language of Chief Justice Shaw in delivering the opinion of the court seems to me so peculiarly applicable to the facts of this case, that I quote a portion of it, viz.: "The use of the common way by each, so far as it was used in and over the soil of the other, was adverse, uninterrupted and used under a claim of right and continued more than twenty years, and thereby each acquired such an easement in that portion of the land of the other which was covered by the way as the other could not lawfully disturb. When such actual uninterrupted use of a way, as of right, is shown to have existed a sufficient length of time to create the presumption of a grant, if the other party relies on the fact that those acts, all or some of them, are permissive, it is incumbent on such party by sufficient proof to rebut such presumption of a non-appearing grant, otherwise the presumption stands as sufficient proof and establishes the right." This was approved in Nicholls v. Wentworth, 100 N. Y. 455–461.

In this case no proof was offered to rebut the presumption, and as we have heretofore seen that the use of an easement for twenty years, unexplained, will be presumed to be under a claim

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or assertion of right, and adverse, and not by leave or favor of the owner.

For these reasons I think the plaintiff is not entitled to maintain her action to restrain the use by the defendant of the way in question.

Let judgment be entered for the defendant.

Judgment for defendant.

PATRICK W. CULLINAN, as State Commissioner of Excise, Plaintiff, *v.* HARRY W. BOWKER and the ÆTNA INDEMNITY CO., Defendants.

(Supreme Court, Franklin Trial Term, April, 1903.)

Principal and agent — Powers of a clerk of a local representative of an indemnity company — Waiver.

A clerk in charge of the business of the local representative of an indemnity company has power, when the local representative is absent from home, to issue and deliver a bond of indemnity, given under the Liquor Tax Law, and the clerk may waive a written condition of its issue.

Therefore, where the bond stipulated that it should bind the company only when signed by its local representative and he did not sign it when it was issued but before issue promised to sign it and upon his return home did sign it, although a breach had previously occurred of which he was ignorant, the court held the company liable upon the bond, either upon the ground of waiver or upon the ground that the subsequent signature of the local representative was merely formal and that by it he only did what he had promised to do.

ACTION to recover the penalty on a bond.

Mead, Stranahan & Guile, for plaintiff.

Badger & Cantwell, for defendants.

KELLOGG, J. M., J. The defendant indemnity company is surety on a bond given by the defendant Bowker under the Liquor Tax

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Law, and this action is brought to recover the penalty of said bond on account of its breach by said Bowker. The indemnity company contends that it is not liable on said bond for the reason that it was not countersigned by Frank S. Channel, its local representative, the bond containing a provision that "This bond shall bind the said Company only when signed by Frank S. Channel its lawful resident Assistant Secretary." When application was made at the office of Mr. Channel for the bond he was absent, but the insurance and bonding business which he carried on was then in charge of his clerk. The clerk issued the bond, delivered it to the principal, and then telephoned to the county treasurer that Mr. Channel was away from home, but had directed him to say that he would countersign the bond as soon as he returned, to which the treasurer assented and the bond was accepted and a liquor tax certificate issued thereon. Sometime afterwards Mr. Channel returned and countersigned the bond. The breach had then occurred but he was ignorant of it. Surety companies are doing a large and increasing business, and seem to be doing it on the general lines followed by insurance companies, and it is perhaps not inappropriate to apply the law relating to the powers of the local agents of insurance companies in their issuing policies to the acts of the local agents in issuing these bonds. This is particularly true as the cases hold that the general powers of the agents of insurance companies as to waiving the provisions in the policies as to conditions existing at the time of issuing them rest not upon provisions peculiar to insurance law, but are found in the general law of principal and agent. Quinlan v. Providence Washington Ins. Co., 133 N. Y. 363, 364.

It is also held that a local agent to whom policies are issued in blank to be countersigned and delivered is, for the purpose of delivering the policy and effecting the insurance, the general agent of the company, and has full power to waive provisions in the policy with respect to the conditions upon which it shall have inception and go into operation as a contract. Wood v. American Fire Ins. Co., 149 N. Y. 382, 385; Robbins v. Springfield Fire Ins. Co., Id. 477.

The clerk in the office of the local agent may fill up, execute and even countersign policies, and waive provisions and conditions the same as his principal, the company's agent, may do.

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Bodine v. Exchange Fire I. Co., 51 N. Y. 117; Arff v. Star Fire Ins. Co., 125 id. 57.

The General Term in this department has held that such clerk, where the policy reads that it shall not be binding until countersigned by its authorized and commissioned agent, may countersign the policy and that it is valid. Clark v. Glens Falls Ins. Co., 21 Wkly. Dig. 197.

In this case it cannot be doubted that the defendant's general superintendent might have personally delivered this bond without Channel's countersigning it, and that the company could not defend upon the ground that it was not countersigned. Channel being the general agent at Malone for the issuing of these bonds, if he had in person delivered this bond to the treasurer without being countersigned, the defendant could not defend, for the countersigning was only to insure the delivery by him and related only to the manner in which the bond should be executed and delivered. This is squarely held in Myers v. Keystone M. Life Ins. Co., 27 Penn. St. 268, approved in Van Schoick v. Niagara Fire Ins. Co., 68 N. Y. 440. The above case establishing that if the bond had been issued by Channel himself and not countersigned it would be valid, it must follow that having been delivered by his clerk, with his consent and approval and presumably by his direction, it is equally valid. The defendant contends that Channel could not delegate to his clerk the discretion and powers conferred upon him. But it is held that performing these duties by his clerk is performing them by himself and is not a delegation of the powers. An insurance agent, or bonding agent, must have the right to employ a reasonable and necessary clerical force, and his clerks, acting under his direction and within his authority, must have power to bind his companies. We cannot assume that Channel did not, by directions to his clerk, exercise all the discretion which the defendant desired him to use and which it was his duty to do. Neither can we assume that the clerk acted outside of his instructions. It is a fair inference, therefore, that this particular bond was issued by Channel in the ordinary course of business, and that while the clerk performed the acts they were done pursuant to the discretion and directions of the agent. According to the law this bond could have been accepted only as a completed instrument, and Mr. Channel and his clerk acting for him must have known, when the bond was delivered to the

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principal to be by him delivered to the county treasurer, that it was delivered as a completed bond, although it was contemplated that the formal countersigning by Channel was to be done strictly to comply with the terms of the bond. The county treasurer or the excise commissioner had the right, under the circumstances, to insist that the bond be countersigned if necessary, and by proper proceedings could have compelled such act to be done. It is probable that the law, for all practical purposes, would deem it as done; but if not, the subsequent act of Channel in countersigning the bond was simply doing what he, and through him the company, had agreed to do before the breach occurred; and, therefore, Mr. Channel, by countersigning in ignorance of the default, violated no duty towards the defendant but only did what the defendant through him had agreed to do. It, therefore, seems that this case is the same as if the defendant itself had delivered this bond to the county treasurer and that the provision that it must be countersigned by Channel was either waived at the time or else was so far merely formal that it may be said to have been complied with when he by his clerk delivered the bond. The plaintiff is, therefore, entitled to judgment. Proper findings or decision may be submitted.

Judgment for plaintiff.

ISRAEL POMERANZ, Plaintiff, *v.* LOUIS MARCUS, Defendant.

(Supreme Court, Kings Trial Term, April, 1903.)

Attorney — Refused leave to continue an action after the parties had settled it.

The parties to an action have a right to settle it and where they have done so the attorney for the defendant will not be permitted to continue the action in order to get costs against the plaintiff as compensation for services rendered his own client.

MOTION by the defendant's attorney for leave to continue this action in order to enforce compensation for his services.

Rudolph Marks for plaintiff.

Gustavus A. Rogers for defendant.

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GAYNOR, J.: The defendant's attorney asks leave to try the action for the purpose of getting judgment for costs against the plaintiff, in order to get paid in that way for his services. The papers reveal that this defendant also had an action pending against this plaintiff, and that the parties met and settled both actions by the payment of $200 by this plaintiff to this defendant, and the exchange of general releases.

The parties had the right to settle their cases; and it follows from the right of the parties to settle an action that neither nor both of the attorneys can keep it going and try it in spite of the parties. Not even the plaintiff can do that to enforce his lien on the cause of action; his lien is subordinate to the right of the parties to settle, and it is necessarily gone when the action is settled (Zimmer v. Metropolitan St. R. Co., 32 Misc. Rep. 262; Dolliver v. American Swan Boat Co., id. 264; Fenwick v. Mitchell, 34 id. 617).

Motion denied.

CHARLES V. THOMPSON and JOSEPHINE THOMPSON, Plaintiffs, v. THE WESTERN UNION TELEGRAPH CO., Defendant.

(Supreme Court, Monroe Special Term, April, 1903.)

Telegraph corporation — The addressee of a dispatch cannot recover the penalty imposed by L. 1890, ch. 566, § 103.

No action can be maintained under the Transportation Corporations Law (L. 1890, ch. 566, § 103) by the addressee of a telegraphic dispatch for the penalty imposed upon a telegraph corporation for its neglect or refusal to transmit such a dispatch with impartiality, good faith and in the order in which it is received, and this because the statute expressly limits the right of recovering the penalty to the sender of the dispatch, or one desiring to send it, and entitled to have the same so transmitted.

DEMURRER to complaint.

George D. Forsyth, for plaintiffs.

George Raines, for defendant.

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DAVY, J. The defendant demurs to the complaint on the ground that it does not state facts sufficient to constitute a cause of action.

The complaint alleges that the defendant was operating one of its lines of electric telegraph between and through the cities of Syracuse and Rochester, in the State of New York; that the defendant on the 23d day of September, 1899, received at Syracuse the following despatch:

"*September* 23, 1899.

"To THOMPSON & Co.,

"Hotel Wendall, Rochester, N. Y.

"Will pay you fifteen cents square yard complete for pavement Elmira. You furnish all labor. Answer quick.

"J. KEEF & Co.

"By F. BAKER, Dunfee Block."

That the defendant was paid the usual charges for the transmission of said despatch, but neglected to transmit the same to the plaintiffs at the Hotel Wendall in the city of Rochester; that for such neglect the plaintiffs are entitled to a judgment against the defendant for the sum of $100, the amount of the penalty provided by statute.

It is not necessary to discuss the question whether the person to whom a despatch is sent can recover damages in a proper case, for failure of the telegraph company to send or deliver the message.

The principal question raised by the demurrer is, whether the plaintiffs, who were the addressees and the parties to whom the despatch was directed to be sent, can maintain this action to recover the statutory penalty.

Laws of 1890, chapter 566, section 103, provides that: "Every such corporation shall receive despatches from and for other telegraph or telephone lines or corporations, and from and for any individual, and on payment of the usual charges by individuals for transmitting despatches as established by the rules and regulations of such corporation, transmit the same with impartiality and good faith and in the order in which they are received, and if it neglects or refuses so to do, it shall pay one hundred dollars for every such refusal or neglect to the person or persons sending, or desiring to send, any such despatch and entitled to have the same so transmitted."

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The section of the statute referred to is highly penal and subject to the rule of strict construction which prevails in respect to such statutes.

Applying this rule to the statute in question, a party who brings an action against a telegraph company to recover a penalty for neglect to send a despatch must bring his case clearly within the letter and spirit of the act.

Where the statute designates the party who shall bring the action, it must be brought by that person and in the precise mode and subject to the limitations provided by the act. Whitaker v. Masterton, 106 N. Y. 277.

Sutherland on Statutory Construction, section 350, says: "Penal statutes can never be extended by mere implication to either persons or things not expressly brought within their terms."

The statute in question prescribes in plain and unambiguous language, that only the person or persons sending or desiring to send the despatch can recover the penalty.

If it had been the intention of the lawmakers to authorize the party to whom the despatch was sent to bring an action to recover the penalty, it is to be supposed that such intention would have been embodied in the act.

In Indiana where there is a similar statute, it is held that the sender of the despatch and not the party to whom it is sent can recover the penalty for a violation of its provisions.

In Hadley v. Western Union Telegraph Co., 115 Ind. 191, the court passed directly upon the question as to whether the addressee is entitled to recover the penalty, and it held that only the sender of the despatch could recover the penalty prescribed by the statute.

I am of the opinion that the plaintiffs cannot maintain this action, and the demurrer must be sustained with costs to the defendant, to be taxed by the clerk of Monroe county.

Demurrer sustained, with costs.

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THE CITY OF ROCHESTER, Plaintiff, *v.* JOHN GLEICHAUF, Defendant.

(Supreme Court, Monroe Trial Term, April, 1903.)

Tax — Not collectible by action — Rochester.

A tax is not a debt but is an impost, not founded on contract, or collectible by action except where there is express statutory authority.

The city of Rochester, being afforded by its charter a complete system for the assessment, levy and collection of taxes, is confined to that system and can maintain no action at law to recover of a city taxpayer city taxes unpaid, in the absence of any authority therefor in its charter.

ACTION to collect taxes levied by the city of Rochester for the years 1899, 1900 and 1901.

William A. Sutherland, for plaintiff.

Isaac Adler, for defendant.

DAVY, J. This action is brought against the defendant to collect taxes levied by the city of Rochester in the years 1899, 1900 and 1901, amounting in the aggregate to $133.18.

It was conceded on the argument that the proceedings to collect the taxes were regular, except that the oaths of the assessors were defective and that the seal of the city was omitted from the warrants issued to the city treasurer in the years 1899 and 1901, and no personal demand for the payment of the taxes was ever made by the plaintiff or its agents. It is also conceded that the defect in the oaths of the assessors is not material, but that the omission to affix the seal of the city to the warrants is fatal to any proceedings under the charter to collect the tax. Matter of City of Rochester v. Bloss, 77 App. Div. 28; affd. by the Court of Appeals, 173 N. Y. 768.

The principal question raised in this case is, whether the city of Rochester is limited to the mode prescribed by its charter for

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the collection of taxes, or may it maintain a common-law action to recover the same.

The plaintiff contends that when the tax-roll was delivered to the city treasurer it became a debt, and the law fastened upon the defendant a legal promise to pay it and that promise can be enforced in an action at law.

The decision of the court in the case of Torrey v. Willard, 55 Hun, 78, relied upon by the learned counsel for the plaintiff in support of his contention, is contrary to the well-settled rule which holds that when the statute provides a remedy for the collection of taxes, which does not embrace an action at law, a common-law action for the recovery of the tax as a debt will not lie.

The levying of taxes is a matter solely of statutory creation and no means can be resorted to in order to coerce their payment, other than those pointed out in the statute. A case might arise where a tax was imposed and no method provided by statute for its recovery, and a resort to legal proceedings would be a matter of necessity. But such a condition could only arise where the Legislature had failed entirely to provide any mode for the collection of the tax. Under the charter no power is delegated to the city of Rochester to maintain an action for taxes. It has the right by summary proceedings to enforce collection by levy and sale.

Section 81 of the city charter authorizes the common council to raise annually such sums as shall be estimated and reported by the finance committee as necessary, *in the manner hereinafter provided.*

Section 82 prescribes how the moneys directed by the common council to be raised as taxes shall be assessed upon the real and personal estate in said city.

Sections 83, 85, 86 and 87 relate to the preparation of the assessment-roll, and require its delivery to the city treasurer with warrants annexed.

Sections 88 and 89 make it the duty of the city treasurer to collect and receive the taxes with certain interest prescribed.

Section 91 directs the city treasurer to issue warrants to the collectors to collect unpaid taxes by distress and sale of goods and chattels.

Section 94 authorizes the sale of real estate charged with unpaid taxes or assessments due and unpaid, and finally, section 82 pro-

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vides for a supplementary proceeding for the collection of any tax for which a warrant has been returned uncollected.

It appears from the above sections that the charter of the city of Rochester contains a complete system for the assessment, levy and collection of taxes. That remedy, under the well-settled rule of law, is an exclusive one and the particular method of procedure therein provided must be pursued and no other.

In Dudley v. Mayhew, 3 N. Y. 9, 15, the court said: "It is very clear that when a party is confined to a statutory remedy, he must take it as it is conferred; and that where the enforcing tribunal is specified, the designation forms a part of the remedy, and all others are excluded."

Again in Hollister v. Hollister Bank, 2 Keyes, 245, it is declared: "Where a statute confers a right, and also, in the same statute, prescribes an adequate means of protecting or enforcing it, the right is confined to the statutory remedy." This rule is also clearly recognized in the case of People ex rel. Feeny v. Board of Canvassers, 156 N. Y. 59.

Cooley in his excellent work on Taxation (2d ed., p. 16), says: "Taxes are not debts in the ordinary sense of the term, and their collection will, in general, depend on the remedies given by statute for their enforcement."

The rule is elementary that a debt is a sum of money due and is founded upon contract, express or implied, while a tax has been regarded and treated as an impost levied by authority of the government upon its citizens for the support of the State. It is not founded on contract or agreement. It operates *in invitum*, and unless the power is expressly given by statute, no action can be maintained for taxes. City of New York v. McLean, 57 App. Div. 604.

The case last cited was affirmed by the Court of Appeals, 170 N. Y. 387. Judge Martin, in speaking for the court, says: "Taxes, unlike debts, are not contractual, but are enforced contributions levied by the authority of the state for the support of its government and other public needs." City of Camden v. Allen, 26 N. J. L. 398; City of Augusta v. North, 57 Maine, 392; Hibbard v. Clark, 56 N. H. 155.

If the municipality were permitted at its pleasure to disregard the method prescribed by statute for the collection of taxes, and put the taxpayer to the annoyance and costs of legal proceedings,

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it would certainly do him great injustice. If the assessment is a debt, then the municipal authorities may disregard the statutory remedies and bring an action against every taxpayer the moment his taxes become due and payable. If this remedy may be resorted to in one case, I can see no good reason why it may not in every case. The temptation to bring common-law actions instead of pursuing the remedy prescribed by the statute would be very great, especially where the amount assessed was sufficiently large to carry costs in the higher courts. This course would be oppressive to the taxpayer and contrary to sound policy. It would certainly be a more expensive mode of collecting the taxes than that provided for by the charter.

The failure of the plaintiff to pursue the remedy in the manner provided by the charter for the collection of defendant's taxes furnishes no ground for bringing or maintaining this action.

The complaint, therefore, must be dismissed with costs to the defendant.

Complaint dismissed, with costs to defendant.

TALLMADGE W. FOSTER and PRESTON STEVENSON, as Trustees, Etc., Plaintiffs, *v.* ROBERT GRIER MONROE, as Commissioner, Etc., et al., Defendants.

(Supreme Court, New York Special Term, April, 1903.)

New York city — Installation of water meters — "Water furnished for business consumption" — Injunction.

Section 475 of the charter of the city of New York does not confer upon the city commissioner of water supply discretionary authority to install and maintain fater meters in premises of said city other than in such as are wholly or partly subjected to use in some regular calling or vocation; and he requires authority from the board of aldermen to install and maintain a meter in an apartment house.

The act of the owners of such a house in supplying, pending installment by him of a separate plant, to the former owner of the apartment house, their next door neighbor living in a private

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dwelling, water for heating and lighting purposes does not make the apartment house a place in which water is furnished by the department "for business consumption" within the charter or the Consolidation Act (L. 1882, ch. 410, § 352).

MOTION for an injunction.

Preston Stevenson, for plaintiffs.

George L. Rives, Corporation Counsel (Chase Mellen, Francis J. Byrne, of counsel), for defendants.

BISCHOFF, J. Pending this action to ascertain the proper amount due, plaintiffs ask to have the defendants enjoined from cutting off the water supply to their premises, an apartment-house, for nonpayment of charges for the period beginning October 23, 1900, the plaintiffs insisting that such charges are excessive, as measured by a meter installed without authority.

The meter was installed in 1895, when the New York City Consolidation Act (Laws of 1882, chap. 410), provided as follows: "§ 352. The commissioner of public works is authorized, in his discretion, to cause water meters, the pattern and price of which shall be approved by the mayor, comptroller and chief engineer of the Croton aqueduct, to be placed in all stores, workshops, hotels, manufactories, public edifices, at wharves, ferry-houses, stables *and in all places in which water is furnished for business consumption by the department of public works,* except private dwellings, so that all water so furnished therein or thereat may be measured and known by the said department, and for the purpose of ascertaining the ratable portion which consumers of water should pay for the water therein or thereat received and used;" and authority for its maintenance, since the Greater New York Charter (Laws of 1897, chap. 378) took effect, January 1, 1898 (§ 1611), is sought in the following provision of such later law as amd.: "§ 475. The commissioner of water supply is authorized, in his discretion, to cause water meters, the pattern and price of which shall be approved by the board of aldermen, to be placed in all stores, workshops, hotels, manufactories, office buildings, public edifices, at wharves, ferry-houses, stables, *and in all*

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places in which water is furnished for business consumption, and, if authorized thereto by resolution or ordinance of the board of aldermen, in all apartment-houses, tenements, flat houses, and private dwellings, so that all water so furnished therein or thereat may be measured and known by the said department, and for the purpose of ascertaining the ratable portion which consumers of water should pay for the water therein or thereat received and used."

It is not contended, and it does not appear, that the authority of the commissioner of water supply has been extended as provided for in the later law, and hence, whether or not the plaintiffs are entitled to the relief demanded, must depend upon the commissioner's authority as directly given.

As stated, all the unpaid charges for which the withdrawal of water supply is threatened have accrued since October 23, 1900, subsequent to the time when the Greater New York charter provisions went into effect, and it is immaterial, therefore, to inquire whether an apartment-house is a "private dwelling" within the meaning of the law in force when the meter was installed, the later law having expressly exempted "apartment-houses" from the commissioner's discretionary authority, and the question before the court having to do only with the maintenance of the meter during the period of such unpaid charges.

It appears that during such period, and up to January 1, 1903, the plaintiffs, under an agreement with the former owner of the apartment-house, supplied his adjoining private dwelling with water for heating and lighting purposes, pending the installation of a separate plant, and this, it is contended, involved a furnishing, by the department, of water to the apartment-house, for "business consumption," within the meaning of both the Consolidation Act and of the Greater New York charter, and so subjected the plaintiffs' premises to the discretionary authority of the commissioner in the matter of the installation and maintenance of meters.

Differentiating "business" from "trade" merely, and according to the former its more comprehensive significance, I am, notwithstanding, unpersuaded that it was the intention of the Legislature to confer upon the commissioner of water supply authority to install and maintain meters, in his discretion, in premises other than such as are wholly or partly subjected to use in some regular

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calling or vocation. If it be deemed of advantage to meter premises conditioned as the plaintiffs' were, at the time when the disputed charges were incurred, the needful authority, by resolution of the board of aldermen, is provided for, and should be resorted to in every case in which such authority has not been directly conferred within the letter and spirit of the law as enacted. Upon no theory of strained or unreasonable interpretation should the commissioner of water supply be permitted to assume authority, the conferring of which is plainly reposed in an important body of the municipal government.

What was meant by the term "business" is, I think, obvious from the language, of the provisions of the Consolidation Act and charter, which immediately precedes it, and the case is one to which the rule *noscitur a sociis* (21 Am. & Eng. Encyc. of Law [2d ed.], 550), is singularly apposite. "The commissioner, * * * is authorized, * * * to cause water meters, * * * to be placed *in all stores, workshops, hotels, manufactories, office buildings, public edifices, at wharves, ferry-houses, stables and in all places* in which water is furnished for *business* consumption." It is to be noted that in each instance of the specified use of the premises in which water is furnished by the department some regular calling or vocation is mentioned, and the only reasonable inference therefrom is that by "*all places in which water is furnished for business consumption*" a like use of the premises was in contemplation. It is certainly an unreasonable view that the Legislature had in mind at the time isolated instances of water supplied, even for some return, to an adjoining house, in a spirit of neighborly accommodation. Popularly, and, therefore, apparently a supply of water under such conditions is not to be regarded as "business."

Hill v. Thompson, 18 J. & S. 165, relied upon for the defendants, is not to the contrary, since the *ratio decidendi* of that case did not involve the meaning of the language here interpreted.

Motion granted, with ten dollars costs.

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CHARLES N. SWIFT, Plaintiff, v. ASPELL & Co., Defendant.

(Supreme Court, New York Trial Term, April, 1903.)

Contract — Public policy — Agent hired for a contingent compensation to get orders for Government supplies.

An agreement, to compensate an agent for procuring orders from the United States Government for supplies for its vessels by giving him one-half of the net profits on the orders he obtained, is not void as against public policy and is enforcible by the agent against his principal.

An owner of goods has a right to employ an agent to sell them to the government and the employment is valid where there is no proof that the agent was expected to or did resort to improper methods or unfair dealings in procuring the orders.

ACTION on contract tried by the court without a jury by consent, and upon agreed state of facts.

George L. Carlisle, for plaintiff.

Michael H. Cardozo, for defendant.

BISCHOFF, J. The plaintiff procured orders from the United States government for supplies to be furnished by the defendant, for use upon vessels in the public service, and in this action the plaintiff's claim for his agreed compensation, in the form of one-half the defendant's profits upon the orders, is resisted upon the ground that the contract was void as against public policy.

If the rule adopted in the Federal courts, as to the enforceability of agreements for contingent compensation in procuring government contracts, is to be applied, the agreement in suit cannot be upheld. In these courts the broad principle is declared that any agreement which has a tendency to introduce into a government transaction, involving the purchase of supplies, elements other than the single consideration of a faithful execution of orders at the lowest price, is void, and the inference that personal solicitation or influence is to be employed is held to be enough to defeat the agreement for compensation, irrespective of

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what was or was not done. Tool Co. v. Norris, 2 Wall. 45; Oscanyan v. Arms Co., 103 U. S. 261.

The extent of the principle thus asserted is indicated in the opinion of Mr. Justice Field (Tool Co. v. Norris, *supra*), as follows: "Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil and strikes down the contract from its inception. There is no real difference in principle between agreements to procure favors from legislative bodies and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both, is the direct and inevitable result of all such arrangements."

The courts of this State, however, when dealing with the question presented under similar contracts, have not gone so far in the acceptance of inferences to avoid the contract, and have drawn a distinction between agreements to procure legislation and agreements to make sales to the government.

A person having something to sell has the right to sell it through an agent, and this right is an incident to his ownership. To declare that he may not employ an agent, upon commission, where the government is the prospective buyer, is to take away what is ordinarily one of the elements of the enjoyment of ownership — the unrestricted right to sell. Upon this line of reasoning, commission agreements for a sale to the government have been upheld and enforced in this State where the agreement did not actively require corruption in its performance.

Treated as a matter distinct in its nature from agreements to procure legislation, an agreement to compensate an agent, for his successful efforts in traffic with the government, has been held binding, where unfairness in the dealings or an intention to resort to corruption did not actually appear from the facts (Lyon v. Mitchell, 36 N. Y. 235; Southard v. Boyd, 51 id. 177), and these cases, while in conflict with the rule laid down in the Federal decisions referred to, afford direct and binding authority for a recovery in this action.

For all that appears, or is to be inferred here, the plaintiff was expected to and did resort to none but the most legitimate methods in procuring these orders for the defendant's goods. Within the rule which, as I have said, obtains in this State, personal solicitation

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was quite proper, and jealous suspicion of the possibility of corruption cannot be invoked to repudiate the contract. The fact that the defendant was willing to pay one-half the net profits contains a suggestion less sinister than that found in the agreement to pay ten per cent. of the gross price received, which was the promise upheld in Lyon v. Mitchell, *supra,* and the measure of the commission in the present case does not necessarily mean that the government must have been overcharged in the usual course of business. If there was a custom in the trade whereby all vendors of such supplies, in large quantities, were put to the necessity of so fixing their prices as to enable them to pay large commissions to agents, the government would have to pay the prices thus fixed by all available sellers. The mere agreement to pay a large commission from net profits does not mean that the buyer was necessarily to pay more than the value of the goods, under normal trade conditions.

I take the law to be settled in this State that such a contract as this, without attack other than as suggested by its terms, is enforceable, and the effect of these State decisions is not deemed to be overcome merely because, in the late case of Veazey v. Allen, 173 N. Y. 359, the court cited the Federal authorities, to which I have referred, in the course of a general discussion of the rules of public policy. The point here involved and directly ruled in the earlier cases in the Court of Appeals, was not involved in Veazey v. Allen, and it is not to be inferred that the court intended to overrule these earlier cases by the mere citation of conflicting Federal decisions, when discussing some different point, especially in view of the fact that in Lyon v. Michell, *supra,* the court expressly declined to follow the case of Tool Co. v. Norris, and expressed the opinion that the latter case was not well considered.

I conclude that the plaintiff should have judgment, upon the agreed facts, in the sum of $6,500, with interest in the sum of $1,560, with an additional allowance of five per cent.

Judgment for plaintiff.

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CHARLOTTE A. MOUNT, as Administratrix with the Will Annexed of MARIA B. MOUNT, Deceased, Plaintiff, *v.* The Right Reverend DANIEL P. TUTTLE, Bishop of Missouri, The Right Reverend ABIEL LEONARD, as Missionary Bishop of Salt Lake, The Right Reverend JAMES B. FUNSTEN, as Missionary Bishop of Boise, The Right Reverend LEMUEL H. WELLS, as Missionary Bishop of Spokane; CHARLOTTE A. MOUNT et al., Defendants.

(Supreme Court, New York Special Term, April, 1903.)

Trust — Construed by the law of the place of administration — Indefiniteness of foreign beneficiary.

The validity of a trust in personalty created by the will of a domestic testatrix is to be determined by the law of the State where the trust is to be administered and, where that is a foreign State, our law (L. 1893, ch. 701) cannot be invoked to sustain the trust.

Where a domestic testatrix, who died in 1899, made in 1880 a bequest to "Daniel P. Tuttle, Bishop of Utah, the Protestant Episcopal Missionary Bishop for Utah and Idaho, in his corporate capacity, and to his successor or successors in office", of a sum of money in trust to erect "within the limits of his episcopal jurisdiction" a church and rectory "to be the property of the aforesaid Protestant Episcopal jurisdiction", and it appeared that Tuttle ceased to be bishop of Utah and Idaho in 1886 and that before 1899 the territory of that diocese or district was divided among three others and that other territory from other States was taken in and that none of these districts had ever been incorporated, the court found no corporation in existence corresponding with "the aforesaid Protestant Episcopal jurisdiction", and declared the trust bequest unsustainable and that it was not saved by the law of Utah or Idaho or by the doctrine of *cy-pres* in Utah.

THE testatrix, Maria B. Mount, late of the city of New York, died October 3, 1899, leaving a last will and testament dated December 22, 1880. By this will, after making various pecuniary bequests, the testatrix divided her residuary estate into three parts,

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of which she gave one to her sister Charlotte, the plaintiff, one to her sister Susan, and the remaining one to the children of a deceased brother, Henry, or the survivors of them, share and share alike, such survivors being the defendants Clara J. Brown, Mary L. and Elizabeth Mount. Among the various pecuniary legacies is the one now in question, and which is quoted in the opinion. The evidence showed that the testatrix was well acquainted with the legatee Bishop Tuttle, and with none of the other bishops. At the time of making the will, Bishop Tuttle was the Missionary Bishop for Utah and Idaho, two territories comprising within themselves a separate missionary district. Down to October, 1886, Utah and Idaho continued as one missionary district, Nevada another, and Wyoming another. Then Bishop Tuttle ceased to be Bishop of Utah and Idaho, and went to another diocese. Later Utah and Nevada were rearranged so as to constitute a new district, and was placed in charge of Bishop Leonard, and Idaho and Wyoming, another new district, was placed in charge of Bishop Talbot. In 1895 Utah and Wyoming were rearranged into two separate districts under Bishop Talbot, and the Western Colorado district was added to the Utah-Nevada district. In 1898, this Utah-Nevada-Western-Colorado district was changed so as to include certain counties only in Nevada, and all of Utah, part of one county in Wyoming and the Western Colorado district, all under the charge of Bishop Leonard as the Missionary Bishop of Salt Lake. The Idaho and Wyoming districts were changed so as to be included in one new district, known as the Missionary district of Boise, and comprised the southern and larger part of Idaho, the western and larger part of Wyoming, except part of one Wyoming county, included in the Salt Lake district, and the Missionary district of Spokane was made to include the northern part of Idaho, in charge of Bishop Wells. None of the districts were shown to have been incorporated.

Tillotson & Kent (Charles S. Martin, of counsel), for plaintiff.

Davies, Stone & Auerbach (Charles E. Hotchkiss, of counsel), for defendant Bishop Leonard.

Archibald M. Langford (William G. Low, of counsel), for defendant Bishop Funsten.

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Robert G. Mead, Jr., for defendant Bishop Wells.

Baldwin & Boston (Charles A. Boston, of counsel), for Bishop Tuttle.

Hamilton & Beckett, for defendants Clara J. Brown, Maria L. Mount and Elizabeth Mount.

Hasbrouck & Johnson, by Lloyd Thompson, for the Attorney-General.

Charles S. Martin, for Charlotte A. Mount, individually, and Susan Mount.

BLANCHARD, J. This is an action for the construction of the will of Maria B. Mount, late of the city of New York, who died October 3, 1899. This will was probated in the Surrogate's Court of the county of New York. It was executed December 22, 1880, and contained the following provision, which gives rise to the present controversy: "After the payment of all my just debts and funeral expenses, I give, devise and bequeath all my estate both real and personal as follows: As a thank offering to Almighty God for all His benefits to me, I give, devise and bequeath unto the Reverend Daniel P. Tuttle, Bishop of Utah, the Protestant Episcopal Missionary Bishop for Utah and Idaho, in his corporate capacity, and to his successor or successors in office, the sum of twenty thousand 00-100 dollars, in trust, nevertheless, to erect therewith at such place within the limits of his episcopal jurisdiction as he, his successor or successors shall select, a Protestant Episcopal church building to God's glory, and the further sum of five thousand 00-100 dollars, in trust, nevertheless, to erect therewith, in the same place, a rectory for the rector or clergyman in charge of said church, to be the property of the aforesaid Protestant Episcopal jurisdiction." Other bequests follow, and finally the testatrix disposes of her residuary estate. The first question presented is the validity of the legacy, and in that connection it must be decided whether its validity is to be determined by the law of the State of New York, where the testatrix had her domicile, or that of the jurisdiction where the trust is to be administered. It is authoritatively settled in this State that the law of the State

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of the domicile of the testator must yield to that of the State where the trust is to be administered, although by the law of the latter jurisdiction the bequest is invalid, and even though it be valid in the former jurisdiction. In the case of Kerr v. Dougherty, 79 N. Y. 327, 342, Justice Miller, in delivering the court's opinion, thus states the law of this State in connection with this subject: "The question discussed was the subject of consideration in the case of Chamberlin v. Chamberlin, 43 N. Y. 424, and it was held that the law of the testator's domicile controls as to the formal requisites essential to the validity of the will, the capacity of the testator and the construction of the instrument. It was also decided that where the will was executed lawfully, the validity of the bequests will depend upon the law of the domicile of the legatee and of the government to which the fund by its terms is to be transmitted for administration and the particular purposes indicated by the testator. It was also said by Allen, J., after laying down the foregoing rule: 'Whatever may be the law of Pennsylvania, a testator domiciled in that State cannot establish, by bequests of personalty to citizens or corporations of this State, a charity or trust to be administered here inconsistent with the policy or the laws of this State. A gift by will of a citizen of this State to a charity, or upon a trust to be administered in a sister State, which would be lawful in this State, the domicile of the donor, would not be sustained if it was not in accordance with the laws of the State in which the fund was to be administered.'" See also Congregational Unitarian Society v. Hale, 29 App. Div. 396, 400. Such being the case, the bequest cannot be sustained by reason of the enactment of chapter 701 of the Laws of 1893 of the State of New York.

The next question which naturally arises is, Where is the trust to be administered? The answer to this is "within the limits of his episcopal jurisdiction"—that is—the jurisdiction of Reverend Daniel S. Tuttle as bishop for Utah and Idaho. But it appears that at the death of the testatrix this jurisdiction no longer existed as a distinct diocese, but was comprised within three separate dioceses. The testatrix, however, intended, in my judgment, that the jurisdiction as it then existed, over which Bishop Tuttle presided, should get the benefit of her bounty. This comprised Utah and Idaho. What then was the law prevailing there? Certain of the statutes of Utah and Idaho are in evidence, and from these it would

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seem that the English common law was in force. R. S. of Utah, § 2488, in effect January 1, 1898; R. S. of Idaho, § 18, 1887. In the absence of these statutes it would be presumed that the common law prevailed there. Zeltner v. Irwin, 25 App. Div. 228, 230. Under the common law the bequest is void for indefiniteness in the beneficiary. Tilden v. Green, 130 N. Y. 29, 45. As stated by Justice Brown in the Tilden case, "The law is settled in this state that a certain designated beneficiary is essential to the creation of a valid trust." The learned justice further says: "The remark of Judge Wright in Levy v. Levy (33 N. Y. 107), that, if there is a single postulate of the common law established by an unbroken line of decisions it is that a trust without a certain beneficiary who can claim its enforcement is void, has been repeated and reiterated by recent opinions of this court." Prichard v. Thompson, 95 N. Y. 76; Holland v. Alcock, 108 id. 312; Read v. Williams, 125 id. 560. Counsel urge that this request should be sustained by virtue of the doctrine of *cy-pres,* which prevailed in the English Court of Chancery, and which it is claimed has been adopted by the courts of Utah, and the case of United States v. Mormon Church, 8 Utah, 310, is cited as authority. It may be observed that this doctrine of *cy-pres* has been repudiated in this State. Tilden v. Green, *supra,* and there is no proof as to the doctrine being adopted in Idaho. It would seem that the doctrine of *cy-pres* was adopted to a limited extent by the courts of Utah, but not in my judgment, to such an extent as to validate a bequest such as the one made by the testatrix in this case. The court, in its opinion, quotes with approval the following language from the opinion of the court in City of Philadelphia v. Girard's Heirs, 45 Penn. St. 9: "And this is the doctrine of *cy-pres,* so far as it has been expressly adopted by us. Not the doctrine 'grossly revolting to the public sense of justice' (Methodist Church v. Remington, 1 Watts, 226), and 'carried to the extravagant length that it was formerly' in England (Witman v. Lex, 17 Serg. & R. 93,) by which an unlawful or entirely indefinite charity was transformed by the court or the Crown into one that was lawful and definite, though not at all intended by the donor or testator. But a reasonable doctrine, by which a well-defined charity, or one where the means of definition are given, may be enforced in favor of the general intent, even where the mode or means provided by the donor fail by reason of their inadequacy or unlawfulness." The only beneficiary stated in the

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will is "the aforesaid Protestant Episcopal jurisdiction." There was no corporation in existence which answered in anywise to that description and there is a question as to whether that description applied only to the provision for a rectory or likewise to the provision for the church. I fail to find any justification in the claim that the testatrix intended the Domestic and Foreign Missionary Society of the Protestant Episcopal Society in the United States of America, a New York corporation, as the beneficiary. By the "aforesaid * * * jurisdiction" the testatrix evidently meant the jurisdiction over which Bishop Tuttle presided, that is, Utah and Idaho, but this jurisdiction ceased to exist before the will took effect by the death of the testatrix, and the territory that was therein comprised at the time of the making of the will was at the time of the death of the testator divided among three jurisdictions, each of which took in likewise other territory. It is open to serious doubt whether the bequests have not entirely lapsed. It was so held in Brooks v. City of Belfast, 90 Maine, 318.

I have reached the conclusion that the bequests for the church and rectory cannot be sustained and that the bequests form part of the residuary estate, to be disposed in accordance with the terms of the will.

Judgment accordingly.

RUFUS C. HUNT, Plaintiff, *v.* JAMES F. McCABE et al., Defendants.

(Supreme Court, New York Special Term, April, 1903.)

Partnership — Not created by an interest in net profits given as compensation for services — Equitable relief refused.

A person who accepts employment from a firm of subcontractors as their general superintendent, he to receive an annual salary and additionally one-third of the net profits of their contract including one-third of the plant so far as the same has been paid for out of the proceeds of their contract, and who accepts and uses a power of attorney to open bank accounts for the firm and deposit and draw out their contract moneys, and who is nowhere described in the contract of employment as a partner except that, as superintendent, he is

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to have full power over the work "as if he were an active partner", cannot be deemed a partner of the subcontractors and, therefore, where the continuing subcontractor declares the subcontract at an end, because of a dispute with the general contractor, and summarily discharges the superintendent, he is not entitled to a continuance of a temporary injunction restraining, upon the ground of his interest in the plant, the subcontractor and other parties in interest from interfering with or removing it — his remedies being confined to an action against the subcontractor for a wrongful discharge or to damages for the latter's breach of the contract of employment.

MOTION to continue an injunction *pendente lite.*

Hatch, Debevoise & Colby, for plaintiff.

Kellogg & Rose, for defendants.

GILDERSLEEVE, J. On February 21, 1900, John B. McDonald entered into a contract with the city of New York, acting by its board of rapid transit railroad commissioners, for the construction of a rapid transit railroad in said city. The firm of L. B. McCabe & Brother, composed of Lawrence B. McCabe and the defendant James F. McCabe, became subcontractors under Mr. McDonald for the completion of sections 13 and 14 of the said rapid transit railroad, commonly called the subway, and entered upon the performance of the work. On November 29, 1901, the Messrs. McCabe entered into a contract with Mr. McDonald, which recites the desire of both "to provide a more efficient superintendence of the execution of said contract by said L. B. McCabe & Brother." It was agreed that Mr. McDonald should nominate and that Messrs. McCabe should appoint a general superintendent, with full power in all respects, as if he were an active partner in the said firm of L. B. McCabe & Brother, in charge of the performance of the work required to be done under the contract. In pursuance of the latter agreement Rufus C. Hunt, the plaintiff herein, was appointed such superintendent. On December 4, 1901, Messrs. McCabe entered into a contract with the plaintiff, whereby the latter was appointed and employed by them as general superintendent of the work to be performed, and, as compensation for these services

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to be rendered, they agreed to pay to him a salary of seven thousand five hundred dollars ($7,500) for the first year, payable in monthly instalments, and after the first year, at the rate of five thousand dollars ($5,000) until the completion of the work, and, as additional compensation, "one third of the net profits which shall accrue to them under said contract with said McDonald, including one third of all the plant, machinery and other property and appliances paid for out of the proceeds of said contract." On the 7th day of December, 1901, the said Messrs. McCabe gave to the plaintiff a power of attorney, bearing date on that day, to open bank accounts, in the name of the firm, and to deposit therein all money due to the firm under the contract, and to draw and pay out such money for the purposes of said contract. Thereafter the said Lawrence B. McCabe transferred to the defendant herein, James F. McCabe, his interest in the said contract between the firm of McCabe & Brother and the said John B. McDonald, with the consent of Mr. McDonald; and the defendant James F. McCabe thereupon gave to the plaintiff another power of attorney containing practically the same authority as that contained in the power of attorney first mentioned. Unlike, however, the first power of attorney, it contained one or two minor limitations of plaintiff's right to act for defendant, and was, by its terms, subject to revocation. These powers of attorney had the approval of Mr. McDonald. The work proceeded, under the agreements and powers of attorney above mentioned, until March 18, 1903, when the defendant McCabe notified the plaintiff of the revocation by him of the power of attorney he had given. In the notice of revocation no mention was made of the power of attorney executed by the Messrs. McCabe. A portion of the plant used in carrying on the work was purchased from the defendants, the Rand Drill Company and the Eastern Stone Company. These defendants, not having been paid therefor in full, have become attachment creditors, and the defendant, the sheriff, has taken, in behalf of these creditors, possession of the plant and has keepers in charge thereof. It is the claim of the defendant McCabe that said plant has cost about the sum of ninety thousand dollars ($90,000), all of which has been paid except the sum of about thirty thousand dollars ($30,000). The defendant McCabe alleges that Mr. McDonald failed and refused to carry out and perform the terms of his contract, in that he failed to make the payments required and failed to allow the

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full value of the work and materials performed and furnished thereunder and that Mr. McDonald was otherwise guilty of a breach of their agreement. The said McCabe further alleges that the plaintiff has failed and refused to carry out the terms of the contract, made and entered into between him and the firm of L. B. McCabe & Brother, in that he negotiated loans in the name of this defendant, giving notes therefor, signed in the name of the defendant by him as attorney, without right or authority, and also absented himself from the line of the work, and engaged in other work, for and on behalf of Mr. McDonald. By reason of such alleged breaches, the defendant McCabe elected to, and did, on March 20, 1903, stop all work on the contracts, assumed to discharge plaintiff from his employment, and, since March 21, 1903, has done no work on the job. A specific breach of contract by Mr. McDonald is alleged by the defendant McCabe to have occurred as follows: Just prior to the receipt by plaintiff, Mr. Hunt, of the said notice of revocation, the Rapid Transit Subway Construction Company had delivered to the plaintiff a check or draft under the contract for work performed, and the plaintiff had deposited this check with the Bank of Washington Heights, to the credit of the defendant McCabe. Owing to the revocation, a duplicate original of which was filed with said bank, the plaintiff could not withdraw the proceeds of said check. The Subway Company, having heard of the revocation of plaintiff's power, stopped payment thereof, and it was, therefore, not honored by the firm of Belmont & Company, the drawee. It was after this that the defendant McCabe declared the contract of McCabe & Brother with Mr. McDonald broken, by reason of the failure to pay him the amount of said check. The defendant McCabe further asserts that he has a claim for work performed and materials furnished to Mr. McDonald, amounting to more than five hundred thousand dollars ($500,000). On the other hand, it appears by the replying affidavits that "the Rapid Transit Subway Construction Company had advanced to the defendant James F. McCabe more than one hundred and eighty-three thousand dollars ($183,000) over the amount due under the contract." This action is brought to enjoin the defendants from interfering with the use of the plant and from removing the same, and for a decree that all persons claiming through or under them are not entitled to the possession thereof and for the appointment of a receiver of the contract above mentioned, entered

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into on December 4, 1901, between the plaintiff and the firm of L. B. McCabe & Brother. A preliminary injunction has been granted, and the motion now under consideration is for the continuance of said injunction during the pendency of this action. What is the precise status of the plaintiff? What rights did he acquire under the powers and agreements above mentioned? What title or interest has he in the plant? Was he a partner of the defendant McCabe or an employee? We must look to the agreement of December 4, 1901, between the Messrs. McCabe and the plaintiff, and to the interpretation of the agreement by the parties, as indicated by the methods and practices observed in the progress of the work, for an answer to these questions. Nowhere in the contract is the word "partner" mentioned, except in describing the plaintiff's powers as superintendent, wherein it states, as we have seen, "with full power over the said work, in all respects, as if he were an active partner." We have also seen that the agreement provides that the salary and the interest in the firm's assets were to be received as "compensation," and that he accepted "employment," and agreed "to perform faithfully all the duties of such employment." It cannot be said that plaintiff, by the terms of the aforesaid agreement, acquired any vested interest whatsoever in the plant during the continuance of the work. For that period it must be held that the plaintiff's interest was limited to the sums provided to be paid to him, as compensation for the services to be rendered by him as superintendent. It was not until the termination of the work, and after the payment of debts and liabilities, that plaintiff could have a vested interest in the firm's assets. When that time should arrive, he was entitled, in addition to the sums received by way of salary, to one-third of the net profits as ascertained and to one-third of the plant. The plaintiff was not a partner of Mr. McCabe. Manifestly, he was not so considered by any of the parties in interest; else, why were the powers of attorney given to him? Had he been a partner, no power of attorney would have been necessary to enable him to accomplish all and even more than he was able to do under the power conferred by those instruments. An interest in the net profits, as compensation for services to be rendered, does not make a person, entitled to the same, a partner. Smith v. Bodine, 74 N. Y. 30; Merchants' National Bank v. Barnes, 32 App. Div. 92; Martin v. Riehl, 27 Misc. Rep. 112. The testimony before me as to Mr. McCabe's alleged insolvency leaves that question

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in too much doubt to award the plaintiff equitable relief upon that ground. Further discussion seems unnecessary, since we have reached the conclusion that plaintiff was an employee. If plaintiff was wrongfully discharged from his employment he has an adequate remedy at law for whatever injury he has suffered. If the defendant McCabe committed a breach of his contract with the plaintiff, the latter's remedy is by an action at law for damages. He cannot maintain an action in equity. We do not undertake, here, to adjudicate the rights of the attachment creditors in the plant. We do hold that the plaintiff's contingent interest in the plant is not such as entitles him to seek relief in a court of equity. For these reasons the motion to continue the temporary injunction must be denied, and the temporary injunction set aside, with ten dollars costs.

Ordered accordingly.

JAMES F. McCABE, Plaintiff, *v.* RUFUS C. HUNT et al., Defendants.

(Supreme Court, New York Special Term, April, 1903.)

Injunction — Delaying a public work to enforce private rights.

McCabe and Brother, subcontractors, under general contractor McDonald, for sections 13 and 14 of the Manhattan subway, appointed, with McDonald's consent, one Hunt as superintendent of the McCabe contract. McCabe, having summarily discharged Hunt and declared his own contract with McDonald terminated, wished to remove the plant, when Hunt, who claimed that his contract of employment with McCabe made him his partner, declared an intention of carrying out the contract and alleged an interest in the plant as a partner. McCabe obtained herein an injunction temporarily restraining Hunt from carrying out McCabe's contract and also restraining McDonald and the Rapid Transit Subway Construction Company from carrying out any contracts made between McDonald and McCabe through Hunt as McCabe's agent or superintendent. The court, having found Hunt not a partner of McCabe, held on a motion to continue the injunction,

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That Hunt should be restrained from carrying out McCabe's contract.

That, as between Hunt and McCabe, the latter owned the plant and was entitled to remove it, exercising care and speed, but that he must not remove any part of the plant essential to preserve the work until a reasonable time had elapsed for the substitution of another plant.

That the order to be entered must contain nothing preventing McDonald from proceeding with the work under other contracts he might thereafter make therefor or from employing Hunt on the work or from contracting with him for it.

MOTION to continue an injunction *pendente lite.*

Kellogg & Rose, for plaintiff.

Hatch, Debevoise & Colby, for defendants.

GILDERSLEEVE, J. In this action, although all the parties named are not the same as in the action of Hunt v. McCabe, in which a decision is handed down herewith (40 Misc. Rep. 461), the controversy arises out of the same transactions. James F. McCabe, the plaintiff herein, is the principal defendant in the other action, brought by Rufus C. Hunt, one of the defendants herein. For the purpose of this decision, which, in view of all the circumstances, we feel constrained to render somewhat hurriedly, we refer to the statement of facts in the decision in the Hunt case. This motion is to continue an injunction, *pendente lite*, restraining the defendant Hunt from the performance of the work heretofore conducted by plaintiff on sections 13 and 14, and the terminals of the rapid transit subway, under contracts made between the defendant John B. McDonald and the Messrs. McCabe, and under contracts made with the defendant Hunt for his employment as superintendent of the work, and from entering into any contracts for purchasing materials, or performing labor, or doing any other act, in the name of this plaintiff, or otherwise, towards the carrying out of said contracts. Said injunction also restrains the defendants John B. McDonald and the Rapid Transit Subway Construction Company from performing the contracts heretofore made between the Messrs. McCabe and Mr. John B. McDonald by and through Rufus C. Hunt, as agent,

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attorney, superintendent or representative of the plaintiff, and from paying out any money, on account of work performed or materials furnished under said contracts, to the said Rufus C. Hunt, or otherwise, or in any way aiding and abetting the said Hunt or any other person in carrying out the same. It is the avowed purpose of the defendant Hunt to continue to its completion the work provided for in the contract between Mr. McDonald and the Messrs. McCabe. It is the claim of Mr. Hunt that he is not the discharged employee of the plaintiff, but that he is a "quasi-partner or coadventurer", and that he, the said Rufus C. Hunt, because of the contract between plaintiff and himself, dated December 4, 1901, has a legal right to complete the contract. I do not think that, upon the facts disclosed by the papers before me, this claim rests upon a sound legal foundation. Such a course might result in a mutual benefit to the parties and to the public, who are deeply concerned in an early completion of this great public improvement; nevertheless, legal rights must not be violated. The McCabe-McDonald contract for the work is now broken beyond all doubt. It is the claim of Mr. McCabe that it was broken by Mr. McDonald. This is sharply denied, and can only be satisfactorily determined upon the trial of the issues presented in this action. Whether rightfully or wrongfully, Mr. McCabe now declares the contract at an end; and, whether right or wrong, he refuses to proceed with the work, and wishes to remove his property therefrom. As between Messrs. McDonald, Hunt, McCabe and the construction company, I think Mr. McCabe is entitled to his property, to wit, the tools, machinery and articles employed upon the work and known as "plant." We have seen from the papers in the action of Hunt v. McCabe, already referred to, that attachment creditors of McCabe are in possession of the property. These creditors are not parties to this action, and I do not undertake to determine their rights here. The action of defendant Hunt, in endeavoring to hold on to the plant in question, to which it must be said Mr. McCabe has legal title, is such an interference with private rights as the courts of this State do not permit. Although public interests may suffer to some extent, a violation of private rights cannot thereby be justified. The voluminous papers before me, as already intimated, present a very sharp conflict of testimony, and the facts cannot be satisfactorily ascertained from the affidavits. Whatever they may finally, upon a trial in open court, be found to be, many

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intricate questions of law will arise in adjusting the rights of the parties to this serious controversy. The temporary injunction may be continued pending the action, but it will require some modifications, and in some respects be made more definite and certain. It is not the intention of the court to go further than to restrain the defendant Hunt from carrying out the McCabe-McDonald contract, and from continuing to act under the powers conferred upon him by the agreement of December 4, 1901, and the powers of attorney, particularly described in the statement of facts in the decision of the case of Hunt v. McCabe. It is assumed that the work of constructing sections 13 and 14 of the rapid transit railroad, and the terminals, notwithstanding the termination of the McCabe-McDonald contract, must be carried to completion. Whether the conditions are such as to warrant Mr. McDonald in calling upon the sureties of Mr. McCabe to finish the work I am not prepared to say, as the contract in full is not before me. Even if it were, I could not determine this question on the present motion. It is not the province of the court, at this time, to direct how and under what circumstances the work shall proceed. There must be nothing in the order, to be entered hereon, tending to prevent Mr. McDonald from proceeding with the work, under other contracts that he may hereafter make, or from employing the said Rufus C. Hunt upon the work, or from contracting with said Hunt for the performance of the work. The order must provide that such portion of the McCabe plant, now upon the work, as is essential to preserve it, must remain for a reasonable time to permit a proper substitution of another plant in place thereof; and the order must further provide that the change be effected with as little injury to the property and with as little delay to the work of construction as the exercise of skill and diligence will allow. Let counsel prepare an order in accordance with this decision, and present the same for settlement in my private chambers at twelve-thirty o'clock P. M. on the twenty-third instant, at which time counsel may appear personally and be heard orally, if they so desire.

Ordered accordingly.

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WILLIAM G. BARSON, Plaintiff, *v.* AGNES K. M. MULLIGAN, Defendant.

(Supreme Court, New York Special Term, April, 1903.)

Ejectment — New trials — Terms — Code Civ. Pro., § 1525.

A second new trial in ejectment is a matter of favor but will be granted where the defendant's defeat on the first new trial may have turned upon questions of pleading and of the order of proof which may be obviated on the next trial by an amendment of the answer and a strict compliance with the rules as to the introduction of evidence.

The defendant must pay all costs, but need not pay damages awarded the plaintiff for the value of the use and occupation of the premises nor double damages awarded for willfully withholding them.

MOTION for new trial.

Forster & Speir, for plaintiff.

William G. Mulligan, for defendant.

GILDERSLEEVE, J. The action is ejectment. The defendant seeks a new trial under section 1525 of the Code of Civil Procedure. The case has been tried twice. A judgment for the plaintiffs on the first trial was reversed on appeal and a new trial ordered, which resulted in a judgment for the plaintiffs awarding them possession of the premises and, as damages, $3,138.31, the value of the use and occupation of the land, $2,450 double damages for wilfully withholding it after notice to quit, and $519.71 costs, making a total of $6,108.02. The jury found the value of the use and occupation of the premises to be $700 per annum for about four years and a half, and the amount was fixed at $3,138.31, as above stated. On plaintiff's motion the damages were doubled under the statute, for three years and six months of the period at the same rate, thus allowing the plaintiff's $2,450. This appears from the clerk's certificate of the minutes of the trial and from the order made by the trial justice. The judgment entered in the suit is that the plaintiff recover of the

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defendants possession of the property and $5,588.31 damages for withholding the premises and $519.71 costs. The defendant appears to have failed at the trial because Mrs. Mulligan, claiming to be a mortgagee in possession of the land, had assigned her mortgage to a Mr. Steers by an assignment absolute on its face, though, as she offered to show, in fact as collateral security for the payment of a note which had been paid. Evidence on this point was excluded by the court on the ground that the facts had not been pleaded and that it should have been presented in chief and not in rebuttal. On appeal the Appellate Division held that this ruling was correct though leaving it to be inferred that the trial justice might, in his discretion, have admitted the testimony so far as it presented a question of the mere order of proof. In ejectment the defendant is entitled, as of course, to one new trial, but a second trial can be granted only as a matter of favor and when the court is satisfied that justice will be thereby promoted and the rights of the parties more satisfactorily ascertained and established. (Code, § 1525; Doorley v. O'Gorman, 31 App. Div. 216.) Considering that the defendant's defeat may have turned on a question of pleading and of the order of proof, which, on another trial, may be obviated by an amendment of the answer and a strict compliance with the rule governing the introduction of evidence, I am inclined to think that a new trial of the action should be granted on the terms imposed by the statute. The counsel for the plaintiff insists that if a new trial is granted it should only be on payment of the costs and $2,450, double damages. Section 1496 of the Code permits the plaintiff in ejectment to demand and recover damages for withholding the property in question, and, by section 1497, these "include rents and profits or the value of the use and occupation." So that, the operation of section 1497 appears to unify the two items of damage and make them inseparable. Formerly they were separate and distinct, and rents and profits or the value of the use and occupation could not be recovered in ejectment, but were only recoverable in a subsequent suit (Larned v. Hudson, 57 N. Y. 151), but under the present Code, that distinction does not exist, and they may now be recovered together, with damages for withholding the premises, in the same action. Clason v. Baldwin, 129 N. Y. 183; Risley v. Rice, 11 Civ. Pro. 367; Gas Light Co. v. Rome, W. & O. R. R. Co., 51 Hun, 119. By section 1531 of the Code the plaintiff in ejectment may have, as damages,

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the rents and profits or the value of the use and occupation of the land. It will thus be seen that the only damages specifically mentioned and defined in sections 1496 to 1531 are the double damages for holding over and the value of the use and occupation recovered by the plaintiff here. Both items of damage are of the nature of compensation for the use and occupation of the land and spring from the same source and obligation. Now, as a condition of granting a new trial the defendant is required to pay all costs and all damages awarded to the plaintiff, other than for rents and profits, or for use and occupation (Code, § 1525) and upon plaintiff's reasoning the result would be that the defendant can have a new trial only on payment of the costs and $5,588.31 damages for withholding the premises; in other words, the entire amount of the judgment. But counsel claims only $2,450 as damages for the holding over. And yet, as already shown, the Code treats the whole recovery as damages, and section 1525 excludes from the damages to be paid the rents and profits or the value of the use and occupation. If the two items of damage which constitute the recovery here are separated violence is done to the integrity of the judgment on one hand, and on the other, if the defendant is required to pay all the damages, violence is done to the provision of section 1525, which excepts from payment damages for rents and profits or for use and occupation. I conclude that the damages mentioned in section 1525, which the defendant is required to pay, are not the penalty for the detention of the premises nor for their use and occupation, but damages of another kind which are recoverable in ejectment, such as for waste and other material injuries to the land. 11 Am. & Eng. Encyc. of Law (2d ed.), 547, 548. This view finds some support in the following cases: Risley v. Rice, 11 Civ. Pro. 367; Wings v. De La Rionda, 20 id. 183. New trial granted, and the judgment entered herein March 28, 1902, to be vacated on payment of all the costs. Costs, other than those in the judgment, to be taxed by the clerk.

Ordered accordingly.

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MARIANA A. OGDEN and ANDREW H. GREEN, as surviving Executors of and Trustees under the last Will and Testament of WILLIAM B. OGDEN, Deceased, Plaintiffs, *v.* MARIANA A. OGDEN, individually; EMILY O. WHEELER, individually and as Executrix of EMILY B. WHEELER, Deceased; CHARLES C. TIFFANY and HENRY E. HOWLAND, as Executors of JULIA W. TIFFANY, Deceased, et al., Defendants.

(Supreme Court, New York Special Term, April, 1903.)

Future estate — When vested.

Where a testator devises and bequeaths his residuary estate, for two lives, to trustees, orders them to deem the corpus divided into a certain number of shares, directs them to collect the income and distribute it annually among named beneficiaries of these shares, and, after the lapse of the two lives, devises and bequeaths the corpus among the beneficiaries in such manner that the parties, theretofore receiving the income only, shall receive and become vested with the estate and property, out of which such income arose, in the same relative shares and proportions in which they were entitled to such income, and there is an absence in the will of any gifts over, words of survivorship, gifts to a class or to issue or to legal representatives, a beneficiary takes a vested interest in the principal of his share upon the death of the testator which he may devise before the expiration of the trust term.

ACTION for the construction of a will.

Mornay Williams, for plaintiffs.

Howland, Murray & Prentice (Charles P. Howland, of counsel), for defendants Emily O. Wheeler and others.

Johnston & Johnston (Edward W. S. Johnston, of counsel), for defendant Alex. McK. Jones.

Frederick S. Wait, for defendants Burley, etc.

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Glover, Sweezy & Glover, for defendants Caroline O. Jones and others.

Cary & Whitridge (Willard Parker Butler, Sanford Robinson, of counsel), for defendant Emily O. Butler.

Daniel Seymour, for defendant Frances S. Whitehouse.

LEVENTRITT, J. This is an action for the construction of a will and presents as the sole issue for determination the ever recurring question whether certain interests are vested or contingent.

Briefly stated, the general scheme of the will is the creation of a trust, measured by two lives, during which the income of the estate, which is divided into a specified number of shares, is to be paid over to named beneficiaries, who are, after the termination of the trust, to receive the principal of the shares from which the income theretofore issued.

The will is a very long document, but only two clauses, the third and sixth, are up for construction in this action. There has been a previous construction (Butler v. Green, 65 Hun, 99) which involved the validity of certain bequests to charitable uses. That question is now eliminated.

William B. Ogden, the testator, died in August, 1877, a resident of this county, where his will was admitted to probate. He was childless and left him surviving his widow, who is still living, four brothers and sisters and certain children, and a nephew and niece, children of a sister who pre-deceased him. Excepting certain specific bequests and devises, the distribution of his entire estate was ultimately to be made among this group of persons.

After appointing executors and trustees the will devises and bequeaths to them all the testator's residuary estate in trust with very broad powers of sale, investment, leasing and administration. It was held in Butler v. Green, *supra,* that there was no equitable conversion of the real into personal property. The trust is measured by the lives of his widow and brother-in-law during which term the trustees are to hold and manage the property, collect the entire income and "to apply the same to the uses of the persons hereinafter mentioned in that behalf, in the manner and to the extent, and in the proportions hereinafter set forth." This is done in the third clause of the will which reads, so far as ma-

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terial, as follows: "*Third.* * * * I order and direct that my said Executors and Trustees shall deem all the property devised and bequeathed to them * * * as divided into twenty shares or portions, and my Executors and Trustees shall from time to time, and at least once in each year * * * apply and pay over such rents, issues, profits and income thereof * * * to the persons and in the proportions following."

Then follow very precise provisions as to the distribution of the income, every beneficiary being designated by name, and the members of each family being included in a separate paragraph. Thus the wife receives four shares or twenty per cent. of all the income; his sister Emily B. Wheeler, an allowance of six per cent. which is to cease on her death; the six children of Emily B. Wheeler, all of whom are named, four per cent. each, to be increased on the death of the mother by the addition of her share, so that the six shall receive thirty per cent. in the aggregate; the two children of his sister Eliza A. Butler, designated by name, two and a half per cent. or a half-share each; the three children of his sister Caroline, by a first and second marriage, all specified with particularity, two and a half per cent. or a half-share each; the three children of his brother Mahlon Ogden, given by name, five per cent. or one share each, to be increased in favor of one of the nephews named after the testator to two shares in a certain contingency not here necessary to enlarge upon, these shares, however, not to be paid to the parents until the children are of age; the two children of a deceased sister, indicated by name, five per cent. or one share each; finally there is a bequest of income to charitable use which has been declared invalid so far as it issued from property in this State.

The principal is disposed of in the sixth clause of the will reading as follows: "From and after the decease of my said wife, Mariana O. Ogden, and my said brother-in-law, Edwin H. Sheldon, being the two lives now in being by which the right of my said Executors and Trustees to collect and receive the rents, issues and profits of my estate are limited, I give, devise and bequeath all and singular the real and personal estate of which my said Executors and Trustees shall theretofore have received the rents, issues, and profits, and all the rest, residue and remainder of my property and estate, whatsoever and wheresoever, not herein otherwise specifically devised and bequeathed in, to and amongst the bene-

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ficiaries under the trusts created by this will, *in such manner that the parties theretofore receiving the income only shall receive and become vested with the estate and property out of which such income arose in the same relative shares and proportions in which they are entitled to said income, viz.*"

Then, in substantially the same paragraphing as under the third clause of the will, disposing of the income, the principal is, with immaterial variation, given to the same beneficiaries. Thus, in default of a devise by his wife, to her heirs four shares. Then follows this subdivision: "2. To the children of my said sister Emily B. Wheeler, namely, William O. Wheeler, Julia H. Wheeler, Emily O. Wheeler, Eleanor Wheeler, Caroline E. Wheeler, and Laura Wheeler, being six persons in all, six shares, or three-tenths of my said estate, but these shares, if vested during the life-time of their said mother, shall be charged with the payment of an annuity of five thousand dollars per annum to her."

The other subdivisions of this paragraph it is not necessary further to particularize; they give to the named beneficiaries the exact share of the principal which under the similar subdivision of the third clause was the source of the income.

The occasion for construction arises through the death, during the continuance of the trust-term, of two of the children of Emily B. Wheeler, namely William O. and Julia H., the former having died January 27, 1900, leaving a will, the executrix of which claims the distributable moneys to which her testator would have been entitled if living; and the latter having died December 22, 1899, as the wife of Charles C. Tiffany, also leaving a will, the executors of which likewise claim the distributable share to which their testatrix would have been entitled if living.

The precise question before the court is: Who is at present entitled to these distributable moneys? Did they vest in Julia H. Tiffany and William O. Wheeler in their life-time or was their interest contingent upon their surviving the trust-term? In the former case they passed under their respective wills; in the latter the testator died intestate as to these shares which then vested in his heirs-at-law and next of kin.

Frequent rereadings of the entire will have only strengthened the conclusion derived from the first cursory perusal that each of the sixteen named beneficiaries, who survived the testator, took

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absolutely vested interests both in principal and income, indefeasible, descendible, devisable, and alienable.

Measured by the rule of intent, or by that of the statute defining what are vested or contingent interests, or by those subordinate rules of construction which are resorted to for the purpose of elucidating intent, the result is the same. I find in this will no uncertainty of person or event which would make the interests contingent, nor do I find provision for any condition subsequent to divest an otherwise vested interest.

It is peculiarly true in seeking the proper construction of a will, that there are always reported opinions which may be made to yield language in support of any proposition argued. But where that most flexible of rules — the intent of the testator — is to be applied to discover the scope and limit of the testator's bounty and where that intent may vary by the change of a word, the presence or absence of a punctuation mark, the existence of varying circumstances surrounding the execution of the will, it is apparent that "each case, as it arises, must be viewed and decided according to its own particular facts and circumstances, and will become a controlling precedent, only, where the facts are the same." Roosa v. Harrington, 171 N. Y. 350.

I can discover but one unmistakable intent in this will. It is to dispose of his entire residuary estate — barring the attempted charitable bequests — to sixteen or seventeen named beneficiaries, who included all his then living nieces and nephews. There is no provision in favor of any afterborn children of his brothers and sisters; no gift to any one family group as a class; no conditions of survivorship; no limitation that division shall be made among those living at the time of distribution; no provision as to the disposition of shares of those who might die during the trust-term which, according to other portions of the will, it is quite apparent the testator expected to continue beyond twenty-one years. Every individual object of the testator's bounty was living at the time he made his will and all but one at the time of his death. They were of all ages; marriages, births, and deaths were to be expected and foreseen in the natural course of events, and we should expect to find in a will drawn with such elaborateness and care as this one, that had the testator intended to confer merely defeasible interests, he would have provided for contingencies which it is not unreasonable to assume he must have foreseen, instead of permit-

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ting a possible successive intestacy in portions of his estate, the extent of which could not be foretold and which might ultimately embrace the larger part of it. The testator certainly did not intend to die intestate as to any part of his property. Possible deaths, among those whom he did not intend to take shares in the principal proportionate to their shares in the income, were in his mind, for he provides for the contingency arising on the death of his sister Emily O. Wheeler, whose "allowance is to cease on her decease." In no other case is a share so to determine. The inference, to me at least, is irresistible that the others, especially the nephews and nieces, were to have his property in any event, under all circumstances and under all conditions, subject merely to the execution of the trust.

Constructions resulting in intestacy are sometimes forced upon the court but I see no such compelling necessity in this case. It is perfectly clear that the testator did not have in mind a class to be ascertained when the shares of principal were to be payable; he was not contemplating changes in the character or number of persons who were the objects of his bounty. The gift at the termination of the trust-term is to individuals named and their precise shares are set out. The gift in each case was, therefore, distributive. Delafield v. Shipman, 103 N. Y. 463; Shangle v. Hallock, 6 App. Div. 58. The identity of these shares with those from which the income is to issue during the trust-term is a strong corroborative circumstance of an immediate vesting of the interests. Warner v. Durant, 76 N. Y. 133; Steinway v. Steinway, 163 id. 183; Dougherty v. Thompson, 167 id. 472. In Warner v. Durant Judge Folger says (at p. 136): "Where the gift is to be severed instanter from the general estate, for the benefit of the legatee; and in the meantime, the interest thereof is to be paid to him; that is indicative of the intent of the testator that the legatee shall, at all events, have the principal, and is to wait only for the payment, until the day fixed." And in Dougherty v. Thompson, the case chiefly relied on by those arguing in favor of intestacy, Judge Landon says (at p. 484): "If the income intended for Stephen Jay Thompson had been the income of the share of the corpus intended for him that would have been an indication of a vested gift of both."

What the testator did in effect was this: The trustees were to hold a share or shares for the benefit of a named beneficiary, pay

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to him the income, and on the termination of the trust pay to him the principal, for he gives "in such manner that the parties theretofore receiving the income only shall receive and become vested with the estate and property out of which such income arose in the same relative shares and proportions in which they are entitled to said income." Does not this import a present gift of income, and a present gift of the principal with merely a deferred enjoyment in possession of the principal share? Especially so when we bear in mind that "a remainder is not to be considered as contingent in any case where, consistently with the intention of the testator, it may be construed as vested" (Hersee v. Simpson, 154 N. Y. 500); that the law favors the vesting of estates and that the presumption is that a testator intends that his dispositions shall take effect in enjoyment or interest at the date of his death. Nelson v. Russell, 135 N. Y. 137.

What is there in this will that injects the element of contingency? It is argued with considerable force that the use of the term "vest" by the testator, in several clauses shows the intention that vesting in its technical legal sense was to be deferred until the time specified. Thus it is argued that because the testator has provided in the sixth clause that "from and after the termination of the measuring lives, he gives, devises and bequeaths all his property in such manner that the parties theretofore receiving the income only shall receive and become *vested* with the estate" and because he has provided that the six Wheeler shares allotted in subdivision two of that clause "if *vested* during the life-time" of the mother should be charged with the payment of an annuity to her, he has already expressed an intention to postpone vesting until the end of the trust-term. Were these phrases considered standing alone out of relation to all else in the will a construction vesting the shares in interest only on the termination of the trust-term, might be justified. With nothing else to limit their meaning, they would have to be taken in their primary technical legal sense, and as there would then be no other *indicia* of the testator's intention, it would have to be held that the testator intended the technical sense which these words usually import. In other words this would be a colorless will where intention would have to be accepted as embodied in the ordinary legal meaning of the words used.

Taking the entire document as a unit, however, we have a dif-

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ferent situation. My view of the intent, as thereby indicated, I have already expressed. Beyond that, however, the testator has by the dispositions and directions he has made created a situation which the statute requires us to construe as vesting the estates in interest at the time of his death. The estates we are considering are future estates. Real Prop. Law, § 27; Pers. Prop. Law, § 2. "A future estate is either vested or contingent. It is vested, when there is a person in being who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain." Real Prop. Law, § 30; Pers. Prop. Law, *supra*. Construed as of the time of the testator's death, and under the mandate of the statute, it is clear that all the beneficiaries of income and principal would have had an immediate right to the possession of the property on the determination of the intermediate or precedent estates or, to paraphrase the leading case of Moore v. Littel, 41 N. Y. 80, that inasmuch as you can point to persons who if the life-estate would presently cease would *eo instanti et ipso facto* have an immediate right of possession, the remainder is vested. It could, of course, be divested by the inclusion of a proper condition subsequent (Campbell v. Stokes, 142 N. Y. 23; Dougherty v. Thompson, *supra*), but the will under consideration with its named beneficiaries whose interest in principal and income are precisely set apart, with its absence of any gifts over, words of survivorship, gifts to a class, or issue or legal representatives (Clark v. Cammann, 160 N. Y. 328), fails to yield anything on which to predicate the existence of such a condition. The testator has by clear language created a set of facts with regard to the estates given, which the statute says shall be held to be vested as of the time of his death; he has omitted any provision for subsequent defeasance. Under these circumstances the actual facts rise superior to a technical construction sought to be injected into a particular word.

But even so far as this particular word is concerned the whole scheme and tenor of the will would indicate that the testator used the word "vest" in the phrases construed, not in the sense of vesting in interest, but in that of vesting in possession. This is certainly the meaning to be educed from the four corners of the will. Without repeating the argument from intent, it is sufficient to say

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that the underlying meaning and purpose of the testamentary gifts are to give to sixteen or seventeen persons, and to no others, a definite share of the estate, the possession of which is postponed for a definite period but the income of which shall immediately accrue. In this connection it may be pointed out that the whole will, as well as surrounding circumstances, points to the conclusion that the postponement of the vesting in possession was, in part at least, for the benefit of the estate. It appears that at the time of his death, a not inconsiderable portion of the testator's estate consisted of unimproved real property, held for development and a rise, and the evident wish of the testator is easily inferable that he desired it kept intact until such time, when its potential value could be best realized. These considerations, arguing a postponement of the vesting for the estate's benefit, rather than for that of the beneficiaries, are an additional reason in favor of treating that vesting as one of interest at the death and one of possession at the end of the trust-term. The authorities so hold. Robert v. Corning, 89 N. Y. 225; Dougherty v. Thompson, *supra,* 486; Marsh v. Wheeler, 2 Edw. Ch. 156. There is also ample authority both in text-books and decided cases where the word "vest" has been used other than in the strict sense of the conveyancer. Mr. Jarman cites many cases where the "natural and etymological meaning" of the term has been followed in cases of death before the vesting of a legacy, where upon the context the "meaning is said to be vested in possession." 2 Jarman Wills (6th Am. ed.), 1624, and cases there cited. Thompson v. Thompson, 28 Barb. 432, is a case in point in this State. See also Parkin v. Hodgkinson, 15 Sim. 293; Hopper v. Demarest, 1 Zab. (21 N. J. L.) 525.

I see no force in the argument that the testator could not have intended that a beneficiary, dying during the trust-term, should have the testamentary disposition of his share, or that, in the absence of such disposition, it should descend to the beneficiary's heirs and next of kin rather than to those of the testator. In the first place, the argument is quite permissible that the testator intended just that, or rather that he gave the shares absolutely and so was not concerned with the manner or time of disposition of the respective shares to be made by the respective beneficiaries. The omission to provide for gifts over in the case of death during

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the trust-term, or to bequeath in the alternative or on contingency to children, issue or representatives, can well be construed into deliberate purpose. With beneficiaries of all ages, with deaths likely to occur in a trust-term of length, it is not fair to assume that the omission was an oversight rather than intentional. But even should it be said that the testator did not contemplate or expect a death or deaths during the trust-term, and that he would have excluded from his bounty devisees or heirs of a beneficiary so dying, it cannot, therefore, be argued that the construction of the will adopted is contrary to the testator's intent. That must be determined as of the time of the making of the will, not as of a subsequent time when certain events have happened which may or may not have been anticipated by him. "We should not impute to the words of a testator a meaning derived from a process of looking backwards." Matter of Russell, 168 N. Y. 177. It is inadmissible to argue that because a testator, had he foreseen certain happenings, would have provided against them; he did by his intention, as expressed, in fact provide against them. That would not be giving controlling force to the rule of intent, but would be creating a new intent after the fact.

I have examined with care all the cases cited by the defendants in support of their view that only contingent estates were created, and without extended review, may say that I find them all distinguishable. While they contain language applicable to the case at bar based on subordinate rules of testamentary construction which these defendants invoke, they are not pertinent, for it is well established that these rules are only aids towards reaching true intent. They cannot be invoked to defeat but only to support it. Where a will is colorless, and there is otherwise no indication of the testator's purpose, one or the other of these rules may become controlling in construction, but one and all must yield to indications of a contrary intent. So in this case where we have a clear intent not violative of any statutory restriction, it must rise paramount. In Dougherty v. Thompson, *supra,* strongly relied on by the defendants, where there were no words of gift, no naming of children or giving their number, where there were words of survivorship and constant readjustments to be made on the coming of age of various beneficiaries who also had no interest in income during minority, and where no intestacy resulted by reason of the construction adopted, the entire basis of the decision

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is the intent of the testator, whose purpose was manifest that the death of any beneficiary should increase the shares of the living.

In Townshend v. Frommer, 125 N. Y. 469, which involved complicated questions under the law of trusts and powers, there was a trust following an earlier one for the benefit of the grantor during her life, to convey the lands to her children "*living* at her decease, and the surviving children of such of them as may then be dead." The intention deduced by the court was to postpone the accruing of any future interests until the event, *i. e.* the death, happened. See Campbell v. Stokes, *supra;* Canfield v. Fallon, 26 Misc. Rep. 349.

In Clark v. Cammann, 160 N. Y. 328 where after a life-estate in the wife there was a life-estate in a portion in a niece and then a provision as to that portion "to pay over and divide the said principal sum * * * unto and among her children, share and share alike, and to their lawful representatives," the Court of Appeals held that had the testator stopped after the words "share and share alike" the will would have been the same as in Matter of Brown, 154 N. Y. 313, and would have held that the legacies vested in the children, both of whom died before their mother, one, however, before the testator's wife who had the prior life-estate in the whole property. The court held that the words "lawful representatives," etc., negatived the claim that the estate vested in the sons; that the testator intended the estate to go to the issue of the sons of his niece; and that as no issue of these sons were in being at the death of the testator, and it was uncertain whether they would ever have issue, the remainder was contingent for the reason that the persons to whom in the event upon which the estate was limited were uncertain. It was a proper case for the application of the rule that futurity being annexed to the substance of the gift, the vesting was suspended.

Rudd v. Cornell, 58 App. Div. 207; 171 N. Y. 114, involved the construction of a will where a trust during the lives of the testator's two youngest children was created with directions to apply one-third of the net income to the use of the wife, and the balance to the use of five named children, with a provision that in case any child should die during the trust-term leaving issue, the issue should get the child's share, but if none, then to be paid to the survivors. At the termination of that trust then "to divide my estate and pay one-third thereof to my wife, if she

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shall then be living, and one share of the residue * * * to each one of my children who shall *then be living* and to the issue of such of them who shall have died, leaving lawful issue him or her surviving, such issue to take the share of the parent; if one, solely; if more than one, jointly and equally." One of the two youngest died leaving a wife and daughter. The daughter died during the trust-term, leaving her mother sole next of kin and heir-at-law. It was held that the testator intended that the daughter, as well as each of his children, took only a contingent or defeasible interest or estate in the trust property, which would not vest until the end of the trust period, or, if vested, would be divested by the death of such child, or issue of such child, during the continuance of the trust period.

This case is nearest on the facts to the one at bar, and yet it must be apparent from the outline here given that it cannot be invoked as authority. The right of a child to take at the expiration of the trust-term is made to depend upon survivorship. The Appellate Division pointed out that there was no present gift, except of income, to children or their issue; that the only words of gift were contained in the direction to divide, no distinction being made in that regard between children and their issue, and that survival to the time of distribution was, under the unmistakable intent of the will, essential to the acquisition of a vested interest. The Court of Appeals, after observing that the will contained no words of gift to the children or grandchildren, either of income or principal, seizes upon the words "shall then be living" as controlling on the question of contingency and accepts as the obvious scheme of the will that the grandchildren, of whom the daughter was one, should take no greater share than the parent and at no earlier time than the parent would have taken if living. Finally, the Court of Appeals distinctly held that the final division was to be made among the members of a class, and that therefore the benefit of the will must be confined to those who came within the category at the date when the distribution or division was directed to be made. In the case at bar we have a distributive gift over and above the direction to divide among named beneficiaries, with absolutely nothing to indicate that the testator was in any wise concerned with questions of survivorship.

It is unnecessary to distinguish further. To construe this will other than as vesting indefeasible interests in income and prin-

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cipal in the respective beneficiaries would, to my mind, be creating an intent for the testator contrary to that which, it seems to me, he has clearly expressed.

I have deemed it unnecessary to consider the law of the States of New Jersey and Illinois where some of the testator's real property is situated, for the reason that I find, upon investigation, that the same construction would obtain there as I have adopted here.

I am, therefore, of the opinion that the executors of the deceased children of Emily B. Wheeler are entitled to the distributable moneys which have heretofore been paid to their testator and testatrix respectively. Submit decision accordingly. Costs to be paid out of the estate.

Judgment accordingly.

THE PEOPLE ex rel. JUDSON A. HYDE et al., Relators, *v.* HERBERT J. POTTER, as Town Clerk of the Town of Massena, Respondent.

(Supreme Court, St. Lawrence Special Term, April, 1903.)

Town Law — Vacancy in the office of a supervisor how filled — Repeal.

A vacancy occurring in the office of supervisor of the town of Massena, St. Lawrence county, through the failure of the person elected to qualify, must be filled by appointment by the justices of the peace of the town and by the town clerk and not by an election held at a special town meeting.

The Town Law (L. 1890, ch. 569, § 240) repealed L. 1890, ch. 252, providing for a special election in such case.

L. 1890, ch. 252 is sufficiently designated in the repealing schedule annexed to the Town Law, and the Statutory Construction Law does not prevent the repealing clause in the Town Law from repealing L. 1890, ch. 252.

APPLICATION for a writ of peremptory mandamus.

H. Benjamin Chase and B. S. O'Neill, for relators.

J. C. Crapser and G. A. Chase, for respondent.

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KELLOGG, J. M., J. This is an application for a peremptory mandamus to compel the town clerk to call a special town meeting for the election of a supervisor in place of Samuel S. Danforth, who was duly elected at the recent town meeting, but failed to qualify. The relators proceed upon the theory that chapter 252 of the Laws of 1890, which amends section 34, of article 3, of title 3, of chapter 11 of part I of the Revised Statutes, is in force. Immediately after the service of the motion papers, all of the justices of the peace and the town clerk of the town met and appointed John C. Crapser as supervisor, and he duly qualified. The Town Law (L. 1890, ch. 569), which was passed June 7, 1890, and went into effect May 1, 1891, makes specific provisions for the appointment and in no way refers to a special election to fill a vacancy. Chapter 252 of the Laws of 1890 was passed May 1, 1890, and became a law immediately, and amends the provisions of the Revised Statutes providing for a special election in such cases, making it apply to some other offices; but, so far as this case is concerned, practically leaving the provision the same as the original Revised Statutes. It is therefore apparent that up to May 1, 1891, a vacancy in the office of supervisor could only be filled by special election. It seems plain that chapter 252 of the Laws of 1890 was repealed by the Town Law, but if not expressly repealed it practically was deprived of any further force by that law and its amendments, so far at least as this case is concerned. Chapter 252 of 1890 expressly provides that it shall not apply to the filling of vacancies in the office of justices of the peace, or of any other town office, where special provision is made by law for the mode and manner of filling the same. The Town Law, at section 234 as amended by chapter 387 of the Laws of 1893, expressly provides that in case any town officer shall fail to file the oath of office and bond within the time required by law "a vacancy shall thereupon be created, *which shall be filled by appointment* in the manner prescribed by this article," and section 232, as amended by the same law, chapter 387 of 1893, and section 65, as amended by chapter 481 of the Laws of 1897, provide that any vacancy in a town office may be filled by appointment. If any question could exist whether the provisions of sections 232 and 65 are permissive only and not mandatory, and therefore would not by implication necessarily repeal chapter 252 of the Laws of

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1890, it is clear that the provision of section 234 is a special provision of law for the filling of a vacancy in a town office caused by a refusal to qualify, and is mandatory and precludes the idea of filling the vacancy in any other manner. So that if chapter 252 of 1890 is not expressly repealed, the terms of that statute and the provisions of section 234 of the Town Law require that this vacancy be filled by appointment.

But it is clear that the Town Law expressly repealed chapter 252 of the Laws of 1890. Section 240 of the Town Law repeals the statutes enumerated in the last column of the annexed schedule of repealed laws, and provides that such repeal "shall include all laws amendatory of the laws hereby repealed." All of title 3 of chapter 2 of part 1, Revised Statutes, is mentioned in the schedule as repealed, and it is clear that, at the time the repealing statute was passed, chapter 252 of 1890 was then a part of the title of the Revised Statutes which was thus repealed. Standing by itself it cannot be questioned that the Town Law expressly repeals this statute upon which the relators rely.

It is claimed, however, that section 33 of the Statutory Construction Law (L. 1892, ch. 677), read in connection with the Town Law, prevents the repealing clause from having the effect stated. That section provides, in referring to general laws, that "an amendatory law passed at such session or at any subsequent session begun before any such chapter takes effect, shall not be deemed repealed, unless specifically designated in the repealing schedule of such chapter." There seem to be three answers to this contention.

First. The provision of the Town Law that the repeal shall include all laws amendatory of the laws thereby repealed, has the same force and effect as if it occurred in the repealing schedule itself so as to read: All of article 3 of chapter 2 of part 1 of the Revised Statutes, and all laws amendatory thereof, are hereby repealed. Such reading would clearly make the law one specifically designated in the repealing schedule. It can have no less effect from the fact that it is contained in the section which refers to the schedule as containing the repealed laws than if expressly written in words in the schedule itself.

Second. We have seen that by itself the Town Law expressly repealed chapter 252 of the Laws of 1890. It cannot be that

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that law remained repealed for a year and then was revived by the Statutory Construction Law, which did not become a law until 1892, two years after the Town Law was passed and a year after it went into effect. It is sufficient to consider the Statutory Construction Law as relating to future legislation, or as referring to laws actually then in existence, without assuming that it was intended to revive laws which had been repealed two years previously. People ex rel. City of Buffalo v. N. Y. C. & H. R. R. R. Co., 156 N. Y. 570.

Third. Section 1 of the Statutory Construction Law says that it "is applicable to every statute unless its general object, or the context of the language construed, or other provisions of law, indicate that a different meaning or application was intended from that required to be given by this law." It is clear, therefore, that section 1 prevents section 33 of the Statutory Construction Law from applying to the repealed clause contained in section 240 of the Town Law, for the reason that section 240 of the Town Law indicates clearly that it was intended to repeal every amendment which had been made to the title of the Revised Statutes in question. The proper construction of sections 1 and 33 of the Statutory Construction Law, read together as they must be, is that an amendatory law, passed at the same session at which a general law is passed, shall not be deemed repealed unless specifically designated in the schedule, or unless the general object, or the text of the language, or other provision of the general law, indicates that such repeal was intended. Such a construction shows clearly that the Statutory Construction Law does not prevent the repealing clause in the Town Law from repealing the statute in question.

But the relators refer to People ex rel. Howard v. Supervisors of Erie County, 42 App. Div. 510, and contend that the provisions of the Town Law for filling of vacancies are in violation of sections 5 and 6 of article X of the State Constitution. In the Howard case the question arose under the charter of the city of Buffalo and section 3 of article XII of the Constitution. The Constitution provides that supervisors in the city shall be elected every odd year except to fill vacancies, and where a vacancy occurred during the first year of the supervisor's term the court held that the appointee to fill the vacancy only held until the January following, and that under this clause of the Constitution a super-

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visor was properly elected at the election following the vacancy, being an even year. And while the court seems to place its decision somewhat upon the provisions of sections 5 and 6 of article X of the Constitution, that case cannot be deemed controlling in this matter. Matter of Schultes, 33 App. Div. 524, seems to take a somewhat different view. In the Schultes case, while it is not entirely clear that the court decided that the above sections of the Constitution did not apply and that the appointee legally continued in the office after January first, it squarely held that an election could not be had in the even year because no statute authorized it, and it denied a mandamus seeking to compel an amendment of the election notice so as to include the office as one to be filled at the election. This is directly contrary to the only question decided in the Howard case where it is held that an officer placed upon the ticket and elected in the even year was entitled to the office as against the appointee.

In People ex rel. Kehoe v. Fitchie, 76 Hun, 82, it was held that the restrictions of sections 5 and 6 of article X of the Constitution did not apply to the office of ward supervisor, citing People ex rel. Hatfield v. Comstock, 78 N. Y. 356, holding that those sections did not refer to the office of superintendent of the poor but only to those offices which in terms were made elective by the Constitution and not those governed by section 2 of article X. Neither is it clear that the succeeding first annual election mentioned in section 5 of the Constitution referred to, means, as applicable to this town, the succeeding general election at which a town officer cannot be elected rather than the succeeding annual town election at which one can be elected. Since the adoption of the new Constitution the town election has been made biennial instead of annual, but that does not necessarily change the construction of this section. The question as to the effect of these constitutional provisions, or for how long the appointment continues, is not before the court and will not be considered further as it has no decisive bearing upon the question whether chapter 252 of the Laws of 1890 was repealed by the Town Law or not. And perhaps the question is not of the most serious practical importance, for if the appointee's term ends January first it is probable he would continue to discharge the duties of the office until his successor qualifies, as is contemplated by the Town Law and the Public Officers Law, or the proper town authorities would

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again fill the vacancy until a supervisor is elected at the next biennial town meeting. The motion is denied, with ten dollars costs.

Motion denied, with ten dollars costs.

Matter of the Judicial Settlement of the Account of ARNOLD H. WAGNER, as Executor of the last Will and Testament of CATHERINE F. GRIFFING, Deceased.

(Surrogate's Court, Kings County, April, 1903.)

Administration — Presumption in favor of executor's account — May employ his son as agent to collect rents — Compromise of claim.

In attacking an executor's account and administration the burden of proof is upon the contestant and where he fails to produce any direct proof of careless or imprudent conduct upon the part of the executor full faith and credence should be given to the acts of the latter.

An executor, having five houses to rent, or sell when the market justifies it, may employ his own son to collect the rents provided the son's compensation does not exceed the customary rates for such services.

An executor should be allowed what he paid a *bona fide* claimant against, and legatee of, the estate, in settlement of her claim, where the money he paid her made a saving to the estate.

PROCEEDINGS upon the judicial settlement of the account of an executor. Motion to confirm referee's report.

Michael F. McGoldrick, for executor.

Sondheim & Sondheim, for Marie Obry, contestant.

CHURCH, S. This is a motion to confirm a referee's report, which passes upon the accounts of the executor and trustee herein. It appears that the executor in question died shortly after making his account, and before the hearing before the referee. The

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counsel for the representatives of the dead executor oppose the confirmation of said report, contending that the referee has committed error in the same.

Of the sixteen objections filed to the account of the said executor but two are sustained by the referee. The referee, however, devotes a considerable portion of the opinion, given with his report, to a severe criticism of the conduct of the executor, and as so much attention has been devoted by the referee in this general dissertation upon the conduct of the executor, it seems appropriate to consider that subject before passing upon the two specific objections to the account.

A careful examination of the testimony and of the conduct of this executor convinces me that the referee has committed a grave error by the sweeping manner in which he has condemned the executor's conduct. On the hearing before the referee the executor's lips were sealed by death, and it was impossible to explain before the referee the difficulties and perplexities of his position, but enough appears to show that the task which was committed to him was a difficult and extraordinary one, and that he has discharged the same honestly and faithfully. The burden of proof in a matter of this kind is upon the contestant, and where the contestant fails to produce any direct proof or evidence of careless or imprudent conduct by the executor full faith and credence should be given to his conduct, and while executors should be held to a strict accountability, yet the courts, in considering their conduct, should appreciate the fact that many times they have difficult and troublesome tasks, caused by decedents leaving their estates in involved conditions.

When the executor took charge of the decedent's estate he found it in the following condition: The household furniture, which was of the value of some six hundred and odd dollars was bequeathed to a son of the deceased and was taken by him, and hence the executor had nothing to do with same. Deceased owned five pieces of real estate, consisting of a house on Clinton avenue, upon which there was a mortgage of $11,000, and four houses on Vanderbilt avenue, each subject to a mortgage of $3,000. Upon these mortgages there was interest, which would become due on April and May first, and also water taxes which would amount to $377.16. In addition, there was the funeral expenses of the deceased, the expenses of probate, an attorney's

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bill of $250, and a claim of one Eva Harrington, which will be referred to hereafter.

Outside of the equity in these houses there was but thirty dollars in cash and some silverware, which was appraised at sixty-five dollars. Therefore, with but this small sum of thirty dollars the executor had to pay these various obligations accruing against this real property, keep the same in repair, and endeavor from any surplus which he might save from rent to pay off the obligations created by the debts of the deceased and the expenses of administration.

The homestead on Clinton avenue the executor was unable to rent, but in October, 1894, sold it for $15,375. It is not shown that by the use of any diligence could the executor have gotten any better price, or that he could have succeeded in renting it in the interim. Out of the proceeds the executor had to pay the mortgage of $11,000, interest amounting to $921.25, taxes, $418.43, expenses of transfer, $66.16, and in addition he paid to the mortgagor of some of the houses on Vanderbilt avenue arrears of interest of $467.06, and taxes on Missouri lands of $340, thus leaving from the sale of the Clinton avenue homestead a balance of but $2,500.

The payment of each of these items is conceded to be proper and correct, and no possible criticism can be made of the executor for making the same.

The four houses on Vanderbilt avenue are estimated to have been worth about $4,500 each, as one of these was sold by the executor in October, 1894, for that sum. Subsequently, the mortgages on two of these houses were foreclosed, and on the foreclosure sale they brought respectively $3,125 and $3,200. Deficiency judgments were entered against the estate on each sale, and it is such mortgagee, as judgment creditor, that contests the conduct of this executor. The fourth house has been held, undisposed of.

It is not shown that there was any lack of care in connection with the renting of the houses or of attention to the same, and it is apparent that if these houses on Vanderbilt avenue had produced the highest rent that Mrs. Griffing had ever received therefor and had been rented continuously, still the executor would have been very much hampered in his administration of the affairs of the estate. It is a matter of general knowledge

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that in the renting of a number of small pieces of real property there necessarily must be made a deduction for periods when the property is unrented, or when there is difficulty in collecting the rents, and there is not one word of proof showing that the amounts realized by the executor were not the highest amounts that could have been realized with good business prudence.

It, therefore, seems to me that in the collection of the assets of the estate that the referee, in complaining of the conduct of the executor, by demanding to know "what has become of the enormous balance" is drawing upon his imagination rather than upon the evidence which is before him.

We next come to the payments made by the executor. In this connection, the referee severely criticises and condemns payments made by the executor to the attorney, Mr. North, also made in connection with the affairs of the estate, but although he criticises he allows such expenditures. If the referee believed that these expenditures were for improper services or were excessive in amounts, then he should have promptly sustained the objections, disallowed the payments of the same, and surcharged the executor therewith; if, on the other hand, they are proper, then no criticism should be made of the executor for paying the same, but the criticism of the same by the referee does not seem to be supported by the testimony, and is evidently a misapprehension of the same, as the deduction seems to be that Mr. North received in connection with a number of accounts, nearly $500, whereas the facts seem to be that Mr. North charged for probate the sum of $50, for adjusting the collateral inheritance tax a further sum of $50, for services in the foreclosure suit, which resulted in relieving the estate of $577.94 costs, the sum of $65. Each of these charges seems to me to be perfectly reasonable and proper in connection with this estate, particularly as it appears that there was some trouble in connection with discovering the whereabouts of some non-resident heirs. If they are reasonable and proper they should not be made the subject of any adverse criticism.

It also appears, without any question, that Mr. North acted as counsel for the testatrix in her lifetime on certain important litigation; that his bill therefor was $250, which he finally compromised at $200, and it seems to me that the executor was entitled to credit for the same, without any slur or insinuation that they ought to have been disallowed but for the failure of the contest-

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ant to make the proof, and it is difficult to see how the contestant could have made any proof in the face of the direct testimony of the rendition of the services, and the fairness of the value of the same, given by the executor, and the presumption that a man rendering services is to be paid.

The referee also criticises the executor for not making prompt disposal of such real estate. It must be borne in mind that in the years 1892 and 1893, the years when the executor first took charge of this matter, it was a period of great commercial and business depression, and that if the executor had attempted to force the sale of this real property, that it is very probable that it would have resulted in greater damage to the estate. The contestant has failed to call any experts to show that this real property was capable of quick sales, or that there was any possible customer for same at this period. The rents which the executor managed to get from this property which he succeeded in renting was greater than he would have received from an ordinary investment on mortgage, such as he would have been authorized to make.

It is also to be noted that none of the legatees under this will have made any criticism of the conduct of the executor in any way, but that the sole complainant is this mortgagee, who subsequently became a judgment creditor of the estate by forcing the sale of the real estate under the mortgages held by her, and thus made a deficiency judgment. For her to complain that a higher price was not obtained at a private sale by the executor so that when a forced sale was had there would be money to meet her deficiency judgment is extraordinary, particularly in view of the fact that at the foreclosure sale she bought in these houses. If they were so valuable, and the executor could have so readily sold them at a price far in advance of the mortgage, why didn't the mortgagee take them for the amount of her judgment? If, on the other hand, they are not valuable and worth but little more than the price at which they were bid in, how can the executor be reprimanded for not disposing of them at a private sale, at a price ample to meet her deficiency judgment?

There remains to be considered the two specific items on which the referee has surcharged the executor. They are as follows, namely:

First. Payments of commissions by the executor to his son,

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Gerard Wagner, for collecting rents and attending to the estate, amounting to the sum of $419.

It is conceded that the price charged is at the proper ratio if it had been paid to the ordinary real estate agent. It does not seem to me that the executor of an estate, where the same consists of real property, is bound to do all the ordinary work of a real estate agent, and he is, therefore, entitled to employ a proper real estate agent, and pay him the usual commissions. We know, as a matter of business experience, that many persons owning real property that is rented to numerous tenants do not attempt to attend to the management of the same but turn the same over to some competent agent who has their respect and confidence. The referee does not seem to contend that this is other than the correct theory, but contends that the person collecting these rents was the son of the executor, and that they should, therefore, be disallowed. It seems to me that the main question is whether the expenditure is a reasonable and proper one, which the executor was authorized to make. If he chooses to have this work done by his son, outside of the regular work which his son would naturally do, and the charge is a proper one there is certainly no reason why it should not be sustained. Of course, under ordinary circumstances, employment by an executor of a member of his family, to perform services for an estate, merits investigation, but where they appear to be services which if they had been rendered by a disinterested person would pass without question then there is no reason for disallowing the same. The suggestion that no voucher is filed for this matter seems to me to be immaterial. It plainly appears by the books that it was paid, the son is alive, and has sworn to the correctness of the same, and, of course, could give a voucher at any time, and the rule requiring an executor to file vouchers was not intended to apply to a matter of this character.

Second. The payments made to Eva Harrington, amounting to $595.83.

It is not claimed that the executor did not, in good faith, pay the items aggregating this amount to Eva Harrington, and take her receipt therefor, but because he had not invested the sum for her in accordance with the provisions of the will, he should be punished by the disallowance of the items which he had actually paid. Eva Harrington evidently had some claim for

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services rendered to the deceased, and hence it was provided in the will that the sum of $3,000 was to be invested for the benefit of the said Eva Harrington, upon the said Eva Harrington electing to waive any claim which she might have for services, against the deceased.

At the time of the decedent's death, as has been shown, there was not only no money to invest, but there was pressing necessity for funds to pay obligations accruing against the real estate and due against the estate. That being the case, it was very necessary that the executor should endeavor to prevent the said Eva Harrington enforcing her claim, which she might have done.

Being a legacy in place of a debt the party would be entitled to interest from the death of the testatrix. Dayton on Surrogates, 464. But the executor, however, paid interest only from one year after he received his letters, and was thus fully justified in quieting the claim of the legatee, and the estate received the benefit of her not enforcing her claim.

Undoubtedly, if the executor had conducted a forced sale and managed to realize $3,000 from all of these pieces of real estate and at once invested the same for the benefit of Eva Harrington he would have been entitled to pay her the income therefrom. By deferring this sale and collecting rents from this real estate he got a very much larger income than he otherwise would have had, and the principle which has disallowed moneys which he in good faith paid out in an endeavor to extricate the estate from a difficult position seems to me to be taking altogether too narrow a view of the situation.

As the theory upon which the referee disallowed the commissions was based upon his criticism of the general conduct of the executor, and also upon his disallowance of the two items above stated, and, as indicated herein, I have disagreed with the referee's conclusions in these particulars, it necessarily follows that his disallowance of the commissions should be overruled.

The motion to confirm the report of the referee is denied, and the account settled as presented, with costs to the executor against said contestant.

Motion denied, with costs to executor against contestant.

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Misc.] Surrogate's Court, Kings County, April, 1903.

Matter of the Transfer Tax upon the Estate of ELLEN G. ANTHONY, Deceased.

(Surrogate's Court, Kings County, April, 1903.)

Transfer tax — Gift by a husband to a wife whom he survived — Intent of donor.

In 1877 the husband, still living, of a testatrix transferred to her name firm profits which he had invested with his firm in a special account and he continued this practice until her death. He wrote a letter to his son and assigned as a reason for the transfer that "in case of any trouble in the concern I would have something for your mother and the children which cannot be touched by the creditors of the concern". After his wife's death all his children signed an instrument permitting him to treat the money as his own. After that one of the children demanded of his father an accounting of his mother's property and was paid by his father a part of it.

Held, that the property belonged to the mother and was subject to the transfer tax upon her death.

That there was no basis for the father's contention that the money should be treated like a deposit made in a savings bank by one person for another and that the trustee, having survived the beneficiary, was entitled to the money.

APPEAL from a decree assessing the interests of the next of kin, under the Transfer Tax Acts.

Sullivan & Cromwell, for appellants.

Edward H. Fallows, for State Comptroller.

CHURCH, S. This is an appeal from the decree assessing the interests of the next of kin under the Transfer Tax Acts.

The facts under which the questions arise are not disputed by the parties, and are set up at great length in the papers. Briefly, they are as follows: Robert E. Anthony was the husband of the deceased. He was a member of a firm in New York city; instead of withdrawing his partnership profits he invested them with his firm, there being a special account of the same kept. On De-

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cember 31, 1877, he transferred this account to the name of his wife, and the account continued in this shape until after the death of his wife. After his wife's death it appears that his partners told him that he would have to be appointed his wife's administrator in order to collect this account, and to avoid the necessity of such proceedings a paper was executed by all of his children that he might treat the same as his own money.

The question that now arises is whether such money, which at the time of the death of the deceased amounted to the sum of $42,766.93 was the property of the deceased, and, therefore, subject to the payment of a transfer tax, or was it the property of Robert E. Anthony.

The appraiser has declared that the same was the property of the deceased, and that, therefore, it was subject to the payment of the transfer tax. Counsel for the appellants contend that this money should be treated as if it was a deposit in a savings bank, made by a person in trust for another, and that under the authority of Cunningham v. Davenport, 147 N. Y. 43, the trustee having survived the beneficiary named, he was entitled to withdraw this money, and that, therefore, it was not subject to the transfer tax.

But, even if this were to be treated exactly as a deposit in a savings bank, it has been held that the mere survivorship of the depositor does not authorize him to treat the money as his own. *The controlling question is the intent with which the account was opened.* If the account was opened with the intention of making a gift or transfer to the beneficiary, then, irrespective of whether the trustee does or does not survive the beneficiary, it is the beneficiary's property. If, on the other hand, it was opened merely for the convenience of the trustee, with no intent to transfer the legal title to the beneficiary, it would remain the property of the trustee. Beaver v. Beaver, 117 N. Y. 421; Cunningham v. Davenport, 147 id. 43; Matter of Totten, 38 Misc. Rep. 349.

What was the intent, therefore, of Robert E. Anthony in opening and continuing this account with the firm of which he was a partner in the name of his wife? It is to be noted that at the time that this account was opened there was severe business depression in this country. It seems as if his evident intention, by transferring the property then standing to his credit in this account to the name of his wife, and causing his surplus of profits

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each year to be deposited in her name, could only be for the purpose of placing her as a creditor of such firm, so that in the event of any failure of said firm she would be entitled to share with the other creditors and thus receive something from the wreck, which could not be done if this account was continued in the name of Robert E. Anthony. Therefore, in addition to the presumption created by the opening of the account in this manner we have this natural business reason, showing an intention to transfer it to the deceased. But, in addition, it appears that Robert E. Anthony wrote a letter to his son, in which he directly confirms the natural presumption from the opening of such above account, in which he stated that he had transferred such special account to the credit of the deceased so that "in case of any trouble in the concern I would have something for your mother and the children which cannot be touched by the creditors of the concern." If this was his own money and there was no intention to make it the property of his wife then it could be touched by the creditors of the concern, and it could only be held securely by Mrs. Anthony from the creditors of the concern upon proof that it was a *bona fide* gift to her and was her property. It may be that shortly after this transfer, if there had been some collapse, a creditor might have attacked the same on the ground that it was transferred for the purpose of defrauding creditors, but that question cannot be discussed at the present time, as any such decision would have proceeded, not on the ground that there was not an intention of giving the title to Ellen G. Anthony, but on the ground that the reason for the transfer to Ellen G. Anthony by Robert E. Anthony was a fraudulent one.

Counsel for the appellants refer to the fact that in this letter Robert E. Anthony used the personal pronoun "I" in stating that he would have something for his wife and children. If it was stated to be his own, then, of course, it could be attacked by creditors and the entire purpose of it would be of no avail, and it could only be saved from the creditors if it was the property of Ellen G. Anthony.

In addition to this specific declaration of an intent to make this the property of the deceased, it appears that some years after the children of Robert E. Anthony had signed this agreement permitting him to manage the matter, his son Robert E. An-

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thony, Jr., made a claim for an accounting of such property and for his share of the same. To this Robert E. Anthony, Sr., acceded, and subsequently gave to Robert E. Anthony, Jr., a large sum of money for his share and took a release therefor. This claim could only be made by Robert E. Anthony, Jr., upon the ground that this property was the property of his mother. If it was the property of his father, as is now contended by his sisters, then he certainly would have no right to demand his portion of the same, nor would his father be likely to grant it.

It, therefore, seems to me that we must treat this property as having been given by Robert E. Anthony to his wife, and that, therefore, when she died she alone was the sole owner of the same, and hence, that it was subject to the provisions of the transfer tax acts.

It is also contended by the Comptroller that the appellants herein have, by certain acts and proceedings since the death of their mother, practically declared that this was her property, and hence that they are estopped from litigating the question of whether she is or is not the owner of the same, but, as I have reached the conclusion that she was the owner, it is unnecessary, of course, to consider this question.

Let the decree assessing said tax be confirmed, and the appeal herein dismissed.

Decree confirmed and appeal dismissed.

Matter of the Judicial Settlement of the Account of ROBERT HAYES, as Temporary Administrator, and as Administrator with the Will Annexed of JOHN HAYES, Deceased.

(Surrogate's Court, Kings County, April, 1903.)

Administration — Administrator's failure to enter deficiency judgments — Errors of his attorney — Confusion of estate moneys — Commissions, etc., refused.

The failure of an administrator to enter deficiency judgments in actions of foreclosure instituted by him does not create a personal liability upon his part where it appears that the judgments, if entered, would have been worthless.

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Misc.] Surrogate's Court, Kings County, April, 1903.

An administrator is liable to the estate for errors in foreclosing made by his attorney; at least to the extent of the estate moneys which the administrator paid to rectify the errors.

Where the administrator confuses money of the estate with other moneys, cannot presently separate them, and has permitted the widow of the intestate to draw from a joint account running to her and him moneys which belonged to his estate, the administrator is liable for the loss.

The court refused him commissions, costs and referee's fees.

OBJECTIONS to the account of an administrator.

A. J. Moore, for administrator.

D. C. Hayes, for Mary Ann Hayes.

Edwin C. Dusenbury, for objectors.

CHURCH, S. The objections to the account of the administrator were referred to a referee, who disallowed many of the items of the said account, and surcharged the administrator to a considerable extent. Notwithstanding that this report surcharges the administrator, the administrator asks to have the same approved. The contestants, on the other hand, contend that the referee should have further surcharged the administrator, and it is upon such objections that the questions in dispute arise.

Several of the objections seek to surcharge the administrator in consequence of his neglecting to procure the entry of a deficiency judgment in various foreclosure suits which were conducted by him. These objections may be considered as a whole.

Upon this point the rule has been very well stated by the referee: That while it is a prudent and proper thing for an administrator or executor to enter a deficiency judgment, and thus be prepared to take advantage of any assets that may come into the hands of the judgment debtor, yet the failure to enter such judgment does not *prima facie* entitle an executor to be surcharged with the amount of the same, but that the contestants should show that if it had been done there was a reasonable probability it would have resulted in collecting money which would have gone into the estate. The evidence not only does not

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show this, but on the contrary it is evident that the mortgagors in each instance were worthless, and that the entry of such deficiency judgments would not have resulted in any advantage to the estate.

I think, therefore, that the referee's ruling on this question was correct.

The other objections urged to the account of the administrator turn upon the management of the estate by the attorney for the administrator, it being contended that this attorney made many errors in the management of the estate, which resulted in great loss and expenditures to the estate, and that these mistakes of the attorney have been intensified by the administrator expending money of the estate to rectify the errors which had been made by his said attorney.

An administrator exercises his own discretion in the attorney whom he employs to advise him or to take charge of matters of the estate, and it seems to me that where this attorney makes a palpable blunder by which loss has been sustained by the estate that the executor is responsible therefor. He certainly is responsible, where, in consequence of such blunder, he expends money of the estate to rectify the same.

It appears that on the foreclosure of the mortgage on property at 66 West Fifty-fifth street, New York city, the attorney, in some way, omitted to make one Brush a party defendant. This resulted in great delay and inconvenience, and finally, in order to quiet the title and to perfect the same, the administrator paid $300 to do so. It seems to me that the administrator should be surcharged with this sum.

Upon the payment of $145 to one Merritt, as commissions on the sale of property for $4,600, it is contended that the sum of $100 was paid over and above his commissions for extra services performed by Mr. Merritt. It appears that upon the foreclosure of this mortgage the attorney for the administrator had made a defective foreclosure by neglecting to notify a proper party interested, and the $100 was paid to Mr. Merritt owing to this neglect of Mr. Moore. I, therefore, think that the administrator should be surcharged with the expenditure of this sum.

It appears that this attorney, in the services which he rendered to the administrator in the settlement of the transfer tax against

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said estate, caused to be incorporated in the appraiser's report the sum of $500 as the costs of A. J. Moore, and that he contends that he is entitled to this amount of money for his fees.

This amount has been disallowed by the referee.

The said attorney also charged, in addition, for his general services, the sum of $1,600, making in all a charge of $2,100, for his services rendered to the administrator.

This has been disallowed by the referee, and the sum of $1,500 fixed as a proper amount.

A careful inspection of the entire case shows that the attorney in this matter was either very neglectful or very ignorant in discharging his duties to the administrator, and yet he seems to ask for compensation at a very high rate for his services. It is difficult to tell how much of these services has been rendered in consequence of his own neglect, or how much of it was really and properly necessary, and in view of the fact that for the transfer tax proceedings, which is a comparatively small matter, this man endeavors to make a charge of $500, it is apparent that he values his services at a very much higher rate than a good lawyer under the circumstances would ordinarily charge his client, and that he endeavored to disguise this charge by incorporating a provision for its payment in the decree fixing the tax, it seems to me that in view of the entire conduct of this attorney, and in view of the large sums of money which he received from the foreclosures of the mortgages, in addition to the other litigation, that for his general services to the estate he will be amply paid if he receives the sum of $500, including the fees on the transfer tax proceedings, and I will fix that sum in place of the $1,500 allowed by the referee for such compensation, and will surcharge the administrator with a thousand dollars therefor.

Subsequent to the argument of the motion to modify the referee's report, and when I was about ready to render my decision, as above indicated, the parties had a further hearing before me upon evidence which had been newly discovered by the contestants.

It appears that there was an account in the Brooklyn Trust Company, the bank-book of which, of John Hayes and Mary Hayes jointly, was in the custody of Robert Hayes, the administrator, for some period before the death of the testator. It appears that after the death of John Hayes there was deposited in said account the sum of $231.50, which was money

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that had been collected from real estate and rentals. The administrator at first stated that this money was collected from Mr. Hayes' real estate, and subsequently modified his testimony by saying that it was collected from the real estate of both Mr. and Mrs. Hayes. It appears that Mr. Hayes had over twenty-five houses, and that Mrs. Hayes had but two, and, therefore, in the ordinary course of events if it was from their joint lands the vast proportion of it was collected from the real estate of Mr. Hayes.

The administrator has made no attempt to account for this money which he has collected, and it is impossible for him at this time to say how much, if any of it, was collected from the property of Mrs. Hayes, but he admits that he did know at the time that the money was deposited, what proportion of it belonged to Mr. Hayes. It seems to me, under those circumstances, that the confusion, if any, which exists in regard to this matter was caused by the negligence of this administrator, and I shall, therefore, hold that this administrator should be surcharged with the amount of $231.50, with interest thereon from the date that it was drawn out by Mrs. Hayes.

This estate has certainly been very badly managed, and there have been other acts which it is unnecessary to comment upon and discuss.

It is apparent from the testimony of the administrator that he was aware from time to time of many of these mistakes made by his attorney. It seems to me, therefore, that when he is surcharged with this large amount that it would be improper to allow him the costs and referee's fees herein, and that they should be charged against him personally, and that he should not receive any commissions for his acts as such administrator.

Let decree be settled accordingly on notice.

Decreed accordingly.

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Matter of the Estate of THOMAS F. CUSHING, Deceased.

(Surrogate's Court, New York County, April, 1903.)

Transfer tax — Taxation of National bank stock of a nonresident — Such a corporation is domestic.

Stock in a National bank, doing business in the State of New York, belonging to the estate of a nonresident decedent is subject to the transfer tax although the certificate of the stock was without this State when he died.

Such a corporation organized under a Federal law is not a foreign corporation as to the State of New York but is a domestic corporation in each State in which it transacts business.

APPEAL from an order fixing and assessing the transfer tax.

Flamen B. Candler, for executors, appellants.

Arthur S. Tompkins, for Comptroller, respondent.

FITZGERALD, S. The property sought to be subjected to the transfer tax consists of 100 shares of stock of the National Bank of Commerce of the City of New York. The appellants claim that the assessment and taxation of this stock were erroneous for the reason that the decedent was a non-resident and the stock certificate was without the State.

In legal contemplation the property of the shareholder is where the corporation exists. It consists of his right to share in the net produce, and, eventually, in the net residuum of the corporate assets resulting from liquidation (Matter of Bronson, 150 N. Y. 1; Matter of James, 144 id. 6; Matter of Enston, 113 id. 174). In Germain v. Lake Shore & M. S. R. Co. (91 N. Y., 492) Judge Earl says: "A share of stock represents the interest which the shareholder has in the capital and net earnings of the corporation. * * * Shares of stock should be distinguished from certificates of stock, which are merely evidences as to the number of shares to which the holder of the certificate is entitled." The theory upon which the courts have proceeded

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in taxing non-residents upon their interests in domestic corporations is that it is an investment of capital in this State, and that to hold otherwise would result in an unfair discrimination against inhabitants of this State. Judge Vann, in the Matter of Bronson (*supra*), who concurred with the majority of the judges as to the taxability of the stock of domestic corporations, in his opinion says: "The decedent placed his property in this state, and thereby impliedly committed it to the jurisdiction of our laws, then in force and such as might be enacted thereafter, and property subject in any respect to the laws of a state, even if only as regards the transfer thereof, must, if required, pay its share toward the enforcement of those laws. Look for a moment at the consequences of holding otherwise. Business corporations might be organized in this state wholly upon foreign capital, a few shares being held in the name of resident directors to make the organization regular, and yet none of the stock, however valuable, be subject to a succession tax. This would tend to drive business corporations into foreign ownership. If the stock of a corporation belonged one-half to residents and one-half to non-residents, the former would be taxable but the latter not, and thus an unfair discrimination would be made against inhabitants of this state."

The appellants urge that the transfer of stock belonging to a non-resident decedent can be taxed only where the shares are those of a domestic corporation; that the National Bank of Commerce of New York is a foreign corporation and consequently the present transfer is exempt.

A corporation created and organized under Federal law is a domestic corporation in each State in which it transacts business. Its residence is the place in which it is authorized to conduct its corporate affairs. A national bank exists solely in the locality where it is empowered to do business, and the Federal statutes provide expressly for the taxation of their shares by the State within whose boundaries the association is located, subject to the prohibition of the taxation of such an investment at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State (secs. 5181, 5190 and 5219, U. S. Rev. Stat.; People, &c., v. Coleman, 135 N. Y., 231; Am. & Eng. Cycl. of Law, vol. 7, p. 694).

Our own Code of Civil Procedure (sec. 3343, subd. 18) de-

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clares that "A 'domestic corporation' is a corporation * * * located in the State, and created by or under the laws of the United States." And Congress has enacted that "all national banking associations established under the law of the United States shall, for the purpose of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the State in which they are respectively located; and in such cases the Circuit and District Court shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State" (U. S. Rev. Stat., supplementary, 2d ed., vol. 1, p. 614).

In Cooke v. State N. B. of B. (52 N. Y., 96–111) Chief Justice Church quotes with approval the opinion of Wayne, J., in the Letson case (Louisville C. & C. R. R. Co. v. Letson, 2 How. (U. S.) Rep., 497) that "A corporation created by and doing business in a particular State is to be deemed to all intents and purposes as a person although an artificial person, an inhabitant of the same State for the purposes of its incorporation, capable of being treated as a citizen of that State as much as a natural person." And at page 112, "Their location (i. e., national banking associations) and place of business are fixed by the law of their creation. They are made inhabitants of the State for the purposes of taxation, and a majority of their managing officers are required by law to reside in the States of their respective location. * * * These banks should be deemed citizens of the States where, by law, they are located."

Order affirmed.

Matter of the Estate of Edward N. Marks, Deceased.

(Surrogate's Court, New York County, April, 1903.)

Transfer tax — Money paid to buy off a contestant of a will is not an expense of administration.

Money paid a niece of a testator by proponents of his will to induce her to withdraw objections to the probate is not deductible from the transfer tax as an expense of administration and this be-

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cause the payment was not made for the estate but was made by the beneficiaries, out of the property transferred to them, in satisfaction of their own contract obligations.

APPEAL from the report of an appraiser fixing and assessing the transfer tax.

Edward H. Fallows, for State Comptroller.

Paul M. Herzog, for executor.

THOMAS, S. The appraiser properly refused to deduct and allow, as an expense of administration, the sum of $10,000 paid to a niece of the testator pursuant to an agreement under which she withdrew objections to the probate of the will. I would rest upon the decision of my associate, Surrogate Fitzgerald, in Estate of Barowsky (N. Y. Law Jour., June 28, 1902) upon this point, if it were not that counsel seems to find some intimation to the contrary in my memorandum in Matter of Thomas (39 Misc. Rep. 223).

In that case an asset claimed by the administrator in behalf of the estate was also claimed by a stranger under a title superior to that of the decedent. A compromise was prudently and properly made which recognized the rights of the estate to a portion of the disputed property. Only so much of the property as remained in the hands of the administrator, after deducting payments to carry out the compromise, was appraised for the purpose of taxation. I remarked that it was competent for an administrator to purchase peace "for the estate" and to charge the disbursement as an expense of administration.

In the present case no purchase of peace has been made "for the estate." The controversy that was settled was between parties claiming rights in the estate under an alleged testamentary paper purporting to be a will, and other parties claiming rights in the estate as heirs at law and next of kin on the theory that there was no will. The compromise effected did not aid "the estate" either in increasing, or in determining, or in quieting a litigation concerning the assets transferred. Whether the proponents in the will contest, or the contestant, prevailed, the transfers from the decedent were taxable, and the value of the estate transferred was the measure of the tax.

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The substance of the compromise was that the niece was to have a part of the estate which was directed by the will to be paid to the legatees, and that the legatees should retain the balance. The person named in the unprobated paper as executor had no authority, implied from that circumstance, to make such a contract, and the agreement was valid only because the beneficiaries under the will joined in it. The payment was, therefore, a payment out of the property transferred to the beneficiaries in satisfaction of their own contract obligation, and was not an expense of administering the estate or deductible from the appraisal (Matter of Westurn, 152 N. Y., 93). As to this branch of the appeal, the order fixing the tax is affirmed.

The evidence before the appraiser as to the value of the copper mine stock was entirely insufficient to establish that it was worth anything whatever, and its par value was improperly included in the appraisal. As to this, the appeal is sustained.

Order affirmed as to one branch of appeal and appeal sustained as to the other branch.

Matter of the Estate of ROBERT GRAHAM DUN, Deceased.

(Surrogate's Court, New York County, April, 1903.)

Transfer tax — Good-will taxable.

The Court of Appeals having held that the definition applicable to "property", as that word is used in the Tax Law (L. 1896, ch. 908, art. X), is contained in section 242 thereof and there declared to "include all property or interest therein", and the Statutory Construction Law (L. 1892, ch. 677, § 4) having defined "personal property" as including "everything, except real property, which may be the subject of ownership", the good-will of the business of a firm is taxable for the transfer tax where the decedent was the sole owner of the firm and his will transferred the business.

APPEAL from an order assessing and fixing the transfer tax.

Julius Offenbach, for State Comptroller.

Rastus S. Ransom, for executors.

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THOMAS, S. The decedent was, at the time of his death, engaged in carrying on business under the firm name of R. G. Dun & Co. The appraiser designated under the Tax Law included in his appraisal the "good-will of the business of the firm of R. G. Dun & Company, $2,000,000," and the tax was fixed on this basis by an order of a surrogate. The executor appealed from that order. In my previous memorandum (39 Misc. Rep., 617) I stated that, upon the authority of the decision of the Appellate Division in this department in Matter of Hellman (77 App. Div., 355), the definition of "personal estate" or "personal property" contained in subdivision 4 of section 2 of the Tax Law must control, and I therefore determined that the good-will of the business was improperly included in the appraisal.

An appeal to the Court of Appeals was then pending, and both of the parties to the proceeding deemed it expedient to defer the making of any order on my decision. The Court of Appeals has now reversed the ruling of the Appellate Division in Matter of Hellman, 174 N. Y. 254, holding that the definition of "property" applicable to article X of the Tax Law, concerning taxable transfers, is that contained in section 242 in article X of the law, as follows: "The words 'estate' and 'property,' as used in this article, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or transferred * * * and shall include all property or interest therein, whether situated within or without this State."

As defined by the Statutory Construction Law (L. 1892, chap. 677, § 4), the term "personal property" includes "everything, except real property, which may be the subject of ownership" (Matter of Jones, 172 N. Y., 575, 585).

The good-will of the business of the decedent is a right, exclusive in him and in those to whom he has given it by his will, to continue that business under the name used by him. It is clearly a thing capable of being the subject of ownership, and it is stipulated to have a large value. It is, therefore, property; its value was properly included in the appraisal, and the order appealed from must, in this respect, be affirmed.

The omission to tax the remainder interests was, under Matter of Vanderbilt (172 N. Y., 69) and Matter of Brez (id., 609), reported subsequent to the order, erroneous. The order will, as

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to this, be reversed, and the tax will be imposed on such remainders pursuant to the supplemental report of the appraiser made pending this appeal.

Order affirmed in respect to good will and reversed as to remainder interests.

Matter of the Estate of HERMAN HEYEN, Deceased.

(Surrogate's Court, New York County, April, 1903.)

Administration — Revocation of letters for cause.

The surrogate removed an administratrix for not trying to sell the fixtures and lease, of a liquor store of her intestate husband, which had five months to run, for letting these fixtures be sold under a chattel mortgage and be bought in by her bartender, who gave a new chattel mortgage, and for assisting him in procuring a renewal of the lease in his name that he might continue the business in her interest — the surrogate deeming these acts breaches of the trust duties which she owed her husband's creditors.

APPLICATION to revoke letters of administration.

Henry B. Wesselman, for petitioner.

Eugene C. Gilroy, for administratrix.

THOMAS, S. The application is to revoke the letters of administration granted to the respondent upon the estate of the decedent, who was her husband.

The principal, if not the only valuable asset of the estate, was a retail liquor store which had been carried on by the decedent, and as to which the decedent had a lease which had about five months to run at the time of his death. The fixtures of the store were subject to a chattel mortgage. The evidence submitted, and on which I am asked to determine the application (a reference having been ordered, but being waived by the parties) satisfies me that the respondent made no *bona fide* efforts to sell said property; that the chattel mortgage was foreclosed under an arrangement procured or assented to by her, under which a

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person who had been in her employ as a bartender became the purchaser and executed a new chattel mortgage; that, through her action and procurement, a renewal of the lease was granted to the same person, and that the business is now being carried on by this person, in his name, but with her assistance and for her benefit. The lease was an asset of the estate, and the opportunity or advantage for obtaining a renewal of it, which the administratrix had by reason of her occupancy as tenant, was also the property of the estate for which she was acting. The procuring of a renewal to be made, not to herself as administratrix, but to a third person for her own benefit, and the concurring in the other transactions leading up to the ostensible ownership of the business and good-will by such third person, for her own personal advantage, were breaches of the trust duties which she owed to her husband's creditors (Zilkin v. Carhart, 3 Bradf., 376; Mitchell v. Reed, 61 N. Y., 123; 84 id. 556). The attempted justification of her acts by the respondent, based upon her necessities, cannot be approved.

As a result I must find that the acts of the respondent constituted misconduct in the execution of her office, and dishonesty, and that by reason thereof she is unfit for the execution of her office, and that the letters of administration issued to her must be revoked (Code Civ. Pro., § 2685, subd. 2).

Application granted.

Matter of the Judicial Settlement of the Accounts of the Trustee Under the Will of Mary E. Roberts, Deceased.

(Surrogate's Court, Rensselaer County, April, 1903.)

Trust — Commissions — Principal and income as between life tenant and remaindermen.

Where a testamentary trust requires the payment of income semi-annually, the trustee is entitled to and should take his commissions semi-annually.

As between the life tenant and remaindermen of a trust "to collect and receive the income and profits" of a fund, money realized by the trustee from the sale of rights and options, enabling him, or

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his testatrix, to purchase additional stock in a corporation, is principal.

Money, received by him from the sale of dividend shares representing corporate earnings, is "income and profits".

Money, representing the increase for which stocks of the testatrix were sold above their inventory value, is principal.

PROCEEDINGS upon the judicial settlement of the accounts of a trustee. Objections to account.

Peck & Behan, for petitioner.

Long & Maxwell, for *cestui que trust.*

George J. McDonnell, special guardian.

HEATON, S. Judicial settlement of the accounts of Charles I. Roberts, as substituted trustee under the will of Mary E. Roberts, deceased, made by such trustee on his application to resign his trust. Objections to the account by life tenant and infant remaindermen.

The first objection is to an item of $250 paid counsel for the trustee, for legal services rendered since 1895, when the last settlement was had. A voucher is filed for such payment and proof of the general nature of the services rendered has been made. No evidence has been offered in opposition. The estate handled by the trustee is more than $30,000, and consists of two trusts, and is made up of mortgages, stocks and real estate. An expenditure of about $30 a year for legal services is not improper and is allowed.

The second objection is to two items aggregating seventy-five dollars paid an accountant in February and May, 1895, immediately following the last accounting. At that time one of the three trusts then existing terminated and the fund constituting it was decreed to be distributed, and the accountant was employed to close the old accounts and open the new ones. A voucher is filed for the payments and no evidence is given in opposition to them. The charge seems to be proper and reasonable and is allowed.

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The third objection is to the commissions retained by the trustee upon semi-annual payments of income made to the life tenant. They average about twenty dollars. There is no proof that the amounts deducted are not correct, but it is claimed that the deductions should not have been made semi-annually. The will directs distribution of the income to be made semi-annually. It has been held that where the total income has been paid annually without deduction for commissions, commissions are thereby waived. Matter of Haight, 51 App. Div. 310. Where the will contains a direction to pay over income semi-annually the same reasoning would apply, and, therefore, such retention is confirmed.

The trustee asks direction of the court as to whether three classes of funds received shall be treated as income and so payable to the life tenant or as *corpus* to be retained for the remaindermen.

The trust in the twenty-first clause of the will of deceased is stated to be "to invest the same and keep the same invested and to collect and receive the income and profits thereof during the life of my son Charles H. Roberts as near as may be semi-annually." There is nothing in this will to indicate that the words "income and profits" mean more than interest and income payable upon her investments at fixed periods. She certainly did not intend that her trustee should speculate with her property in an effort to make "profits" for her son, and thereby prejudice his semi-annual payments for maintenance and support, which she has provided for with great care. In the light of this plain intention of the testatrix let us examine the question as to what of this estate is income and what is principal.

The first of these funds is that derived from the sale of stock rights and options issued in connection with corporate stock owned by deceased, which passed to her trustee. Such rights or options enabled the trustee to purchase additional stock of such corporation on advantageous terms. This right or option had a market value, and he sold it instead of investing new money. Had he availed himself of the right he would have made a new investment, which would have consisted of new shares of stock purchased at par, but worth more than par, and such new stock would have been corpus. Instead of thus investing he sold the "right" for cash. The amount realized is not income but principal, as the stock would have been had it been purchased and

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sold. Matter of Kernochan, 104 N. Y. 618; Stewart v. Phelps, 71 App. Div. 91.

The second of these funds is that derived from the sale of shares of stock, issued as dividend shares, and sold by the trustee. It is admitted by all parties that these dividend shares represented earnings of the corporations. The corporation might have distributed its earnings in money, but instead thereof it issued to its stockholders its own obligations in the form of stock certificates against its accumulated surplus, which were sold by the trustee for cash. Such fund then represents income and profits and belongs to the *cestui que trust* and is not *corpus*. McLouth v. Hunt, 154 N. Y. 179; Lowry v. Farmers' Loan & Trust Co., 56 App. Div. 408.

The third fund represents increase for which stocks sold over inventory value. It is not the rule to consider such increase income or profits. But it is said that these stocks were worth more in the market when sold than when inventoried to the trustee, and that the overplus represents income and earnings not distributed by the corporation, which have had the effect of increasing the market price. This may be in part true, but the decisions already cited hold that such earnings are not income until so declared to be such and distributable to the stockholders. Such increased market value may be due to the high rate of dividend regularly maintained, to good management, to increased opportunity and facility for a profitable business. No one could determine what proportion of the increased market price could be allotted to each of these and many other causes for enhanced market value. There is no provision in the will requiring the life tenant to make the trust estate good for any depreciation in the market value of securities, and he would not be awarded the income accruing from natural causes. Stewart v. Phelps, 71 App. Div. 91.

Decreed accordingly.

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Matter of the Accounting of EMILY S. PRAY, as Administratrix c. t. a. of ANN M. SWEZEY, Deceased.

(Surrogate's Court, Suffolk County, April, 1903.)

Administration — Claim for services to a decedent — Construction of "expenses of the administration".

A claim against the estate of a decedent for services alleged to have been rendered him must be rejected where there is no proof except by the claimant that he ever agreed to pay for them, where no payment of them was ever demanded of him, and where during the period of alleged service the claimant paid board to him and did not set the board off against the claim now alleged.

Under a legacy of a sum of money in bank, less the cost of tombstones "and the expenses of the administration of my estate", the latter phrase is to be construed as covering all such expenses except commissions and the transfer tax. That tax must be apportioned where there are several legatees.

DISPUTED claims against an estate heard before the surrogate by stipulation.

Rowland Miles, for administratrix.

Charles B. Patridge, for claimants.

PETTY, S. Following the method of computation adopted in Hall v. Brennan, 140 N. Y. 409, it appears that the claim of Hawkins is for the most part barred by the statute which the administratrix is in duty bound to plead. At the time of the death of the testatrix, February 27, 1901, the six years had not run out by four months. The statute ceased to run for eighteen months after this death, or until August 28, 1902, when it recommenced. Four months from this date the claim would have been entirely barred. Within this time, however, the claim was presented and the stipulation entered into pursuant to section 1822 of the Code of Civil Procedure. The last four months of the claim is, therefore, alive, but as to this part of the claim

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the objection is made that there is lack of proof. No payment was ever demanded of the decedent. There is no evidence of any agreement between the parties, and the claim rests entirely on the testimony of the claimant that the services were performed without compensation. In addition it appears that during certain periods the claimant paid board to the deceased without setting it off against this claim. This hardly brings the claim within the familiar rule that "claims withheld during the life of an alleged debtor and sought to be enforced when death has silenced his knowledge and explanation, are always to be carefully scrutinized, and admitted only upon very satisfactory proof" (Kearney v. McKeon, 85 N. Y. 136), and consequently the claim must be disallowed.

As to the claim of Swezey the item of $85, for care of the premises subsequent to the death of testatrix, is reasonable and proper. The services covered by the $210 for twenty-one months, at $10 per month, were rendered, and the charge is reasonable. There is some evidence that claimant has been paid $1 per week by decedent, but for what length of time does not appear. Assuming it was paid continuously there is nothing to warrant the assumption that the parties agreed on that sum as the compensation. If paid at all it must be regarded as payment on account in view of the fact that the services were worth much more than the amount paid. The $210 is, therefore, allowed. At the end of the service covered by this item a service of thirty-seven weeks began for which a charge of $10 per week is made. The explanation offered is that deceased was stricken with paralysis and needed greater attention, hence the increased charge. The charge of $10 per month for the first period is an admission that the same is proper compensation for the services rendered. These services were the same during the second period of thirty-seven weeks as during the first period of twenty-one months, except that during the thirty-seven weeks deceased was afflicted with paralysis necessitating greater attention on the part of the claimant. The only additional service, therefore, was that of increased personal attention, and this hardly warrants a quadrupling of the charge. If something more than double were charged I believe it would be more consistent. The item of $370 is, therefore, reduced to $222.

A construction of clause third of the will is asked as affecting

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the distribution of the estate. This clause bequeathes to a legatee the money in the Seaman's Bank, after paying out of it the cost of tombstones "and the expenses of the administration of my estate." Expenses of administration include such disbursements as a representative is called upon to make in securing the proper and orderly settlement of the affairs of the deceased. The commissions of the representative are not to be included, for these rather constitute, in part, at least, the pay of the representative for seeing that the expenses of administration are incurred and paid. In the present case the expenses payable under the third clause of the will include the disbursements made in obtaining probate of the will and letters of administration with the will annexed, including the costs awarded the cross-petitioner, the expenses incident to the taking of the inventory and publishing notice to creditors, counsel fees, transfer tax expenses, other than the tax itself, and costs on this accounting, but they do not include commissions. The amount paid for transfer tax should be apportioned among the several legatees as so much paid on account.

The accountant may submit decree conforming hereto.

Decreed accordingly.

Matter of the Final Judicial Settlement of the Estate of HATTIE C. MAYBEE, Deceased.

(Surrogate's Court, Sullivan County, April, 1903.)

Administrator — Liability for money received in another capacity — Code Civ. Pro., § 2596.

Where a man dies intestate and leaves a daughter, Hattie, his sole next of kin, and she dies intestate and leaves only a son and the administrators of the man, there being no interfering rights of creditors or any other rights, pay Hattie's interest in her father's estate, without appointment of an administrator for her estate, directly to the general guardian of her son, his father, upon the ground that the son is her sole next of kin, the payment is valid and the general guardian thereafter holds the money as the property of the son; and therefore where the general guardian is subsequently appointed

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one of Hattie's administrators, he cannot be compelled to account under Code Civ. Pro., § 2596, for the money, as it never was a part of Hattie's estate and never came into his hands as her administrator.

PROCEEDINGS upon the final judicial settlement of the accounts of administrators.

Benjamin Reynolds, for administrators.

T. E. Bush, for sureties.

W. L. Thornton and George H. Carpenter, for contestants.

SMITH, G. H., S. This contest arises upon the final settlement of the estate of Hattie C. Maybee, deceased. The account of John J. Maybee, one of the administrators, is attacked on the ground that he has not charged himself with the sum of $1,838.18, which was paid to him by the administrators of the estate of Burr Wilson, deceased, prior to his appointment as administrator. Burr Wilson died October 20, 1893, and letters of administration upon his estate were issued December eighth following. He left him surviving a widow and one daughter, Hattie C. Maybee. Before his estate was settled, and on January 1, 1894, Hattie C. Maybee died leaving her surviving John J. Maybee, her husband, and Harry W. Maybee, her only son. No administrator of Hattie's estate was appointed until May 6, 1901. Subsequent to Hattie's death, and on the 13th day of February, 1894, John J. Maybee was appointed the general guardian of his son Harry. On the ninth day of April following the administrators of Burr Wilson filed a petition in the Surrogate's Court and obtained an order authorizing them to pay to John J. Maybee, as guardian for Harry, his distributive share of the Burr Wilson estate, not exceeding $1,500. Thereafter, and before letters of administration were issued upon Hattie's estate, the administrators of Burr Wilson paid to said John J. Maybee, as guardian, the sum of $1,838.18. These payments were made upon the theory that Harry, upon the death of his mother, became the sole next of kin of Burr Wilson. The contestants now claim that upon Hattie's death her interest in the estate of her father passed to her personal representative, and that John, hav-

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ing received the money and afterward having been appointed administrator, his appointment relates back, and he is liable for the money, as administrator, under section 2596 of the Code of Civil Procedure.

The validity and force of this objection must depend upon the question of the legality of the payments to John J. Maybee as guardian. If the administrators of Burr Wilson were justified in distributing the share, which would have belonged to Hattie had she been living, to Harry through his guardian it necessarily follows that the same money being lawfully in the hands of Harry's guardian as his estate, could not be a part of the estate of Hattie. Was the payment of Hattie's interest in the estate to her son Harry valid in law? As a general rule the right to a distributive share of the estate of a decedent becomes vested upon his death, and if the distributee dies, before distribution is made, the share should be paid to his executor or administrator. Where, however, there are no creditors of the distributee and no claims of husband or widow to adjust, a payment direct to the next of kin is valid. The same result is accomplished by a more direct method. In this case Hattie was the only next of kin of Burr Wilson, and upon her decease before distribution of his estate, her only next of kin, Harry, became entitled to her interest in his estate, subject of course to the claim of her creditors and the rights of her husband. No claim is made here by either. The husband paid the claims for monument and funeral expenses, and assigned his entire interest in the estate to his son Harry. The administrators paid the money to him as general guardian, on the theory that Harry was entitled thereto as sole next of kin. They procured an order authorizing the payment as to a large part of the funds, and upon the final settlement of their accounts they were credited with and allowed the amount of such payments in full. The money, so far as it represented the interest of Hattie in the undistributed estate of her father, went precisely the same as it would had an administrator of her estate been appointed before the distribution. The money being in the hands of the guardian as a part of the estate of the ward, it was not, at any time, a part of Hattie's estate, and section 2596 does not apply. Had the money come into the hands of John as a part of Hattie's estate he could be compelled to account for it as administrator under that section. The evidence shows that no part of

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this money was in John's possession or under his control at the time letters were issued to him. If it had come into his hands as administrator he would have been liable also as general guardian, but it does not follow that having received it as guardian he was also liable for it as administrator of his wife's estate. Matter of Noll, 10 App. Div. 356.

These moneys never having become a part of the estate of Hattie C. Maybee and never having come into the hands of John J. Maybee as administrator he is not liable to account for them in this proceeding. While Hattie had a vested interest in the undivided estate of her father at the time of her death, still the part of his estate which was paid to her husband, as guardian, cannot be said to have been at any time a part of her estate.

It is not the purpose of this decision to determine the extent of the liability of John J. Maybee or his sureties, as general guardian of Harry W. Maybee. The release of his interest in his wife's estate to his son purports to have been executed to reimburse the son for moneys lost by him, but the value of that interest or the amount of the ward's estate cannot be determined in this proceeding.

A decree may be entered settling the accounts of the administrator as filed.

Decreed accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* CHAUNCEY W. WALKER, Defendant.

(Court of General Sessions of the Peace in and for the City and County of New York April, 1903.)

Crimes — New trial for newly discovered evidence.

New evidence of the good character of the defendant is not a sufficient ground for granting him a new trial for newly discovered evidence, and where he fails to meet any of the conditions requisite in such a case his application must be denied.

DEFENDANT claimed to be the agent for an Illinois company engaged in the business of examining insurance policies and report-

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ing to clients on the standing of insurance companies and as to the form and sufficiency of policies issued. He claimed also to have exclusive territorial rights in New York and New England as such agent. He sold to the complainant a territorial right for the State of New York upon assurances that it was "virgin territory" and had not been sold to other parties but should be the exclusive territory of the complainant. It was maintained upon the trial and found by the jury that these representations were false and fraudulent inasmuch as the territorial right for the State of New York had been sold to other parties prior to the sale to the complainant. A motion for a new trial and to set aside the verdict was denied.

Reargument and reconsideration was asked for on the ground of newly-discovered evidence consisting chiefly of testimony as to the character of the defendant and the company employing him.

William Travers Jerome, District Attorney (Robert C. Taylor, Assistant District Attorney, of counsel), for People.

Charles E. LeBarbier, for defendant.

McMahon, J. This is a motion "for a reargument and reconsideration of the motions heretofore made by the defendant for a new trial and in arrest of judgment, and to set aside the verdict of the jury, and for a new trial upon the ground of newly-discovered evidence."

The defendant was convicted of grand larceny in the second degree for obtaining a certain sum of money from the complaining witness on the false and fraudulent representation that certain territorial rights which he, as agent of a company known as the Policy Holders' National Union of Chicago, was authorized to sell and dispose of represented "virgin territory," and had not been sold and would not be sold to any other parties, but that the complainant should have the exclusive privilege of representing and acting for said company in said territory under the conditions of a contract mutually signed. It was contended by the People and found by the jury that these representations were false and fraudulent, inasmuch as the said territory had been previously disposed of, not once, but several times.

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The motion being made after judgment, it is only necessary to consider the last clause of the defendant's request. Code Crim. Pro., §§ 443, 446.

After the trial application was made to the Supreme Court in another department for a certificate of reasonable doubt, which was denied by Maddox, J. This was done presumably after full consideration of the case and the evidence presented, and after hearing argument of counsel thereon. If, therefore, it were proper on this motion to go into the case itself either to discover error in law or insufficiency of evidence, this decision of Justice Maddox on the question of reasonable doubt would seem to make it unnecessary.

The bulk of the moving papers consists of affidavits as to the good character, not only of the defendant, but of the company whose agent he professed to be. Much of this would have been excluded if offered at the trial, because it relates to specific acts of honesty and is no sufficient or competent proof of general reputation.

The two principal affidavits, aside from that of the defendant himself, are made by parties who were witnesses on the trial (by commission), and who were officers of the company for which the defendant claimed to act. It appears from the papers submitted by the People against this motion that these two witnesses, one being a brother of the defendant, are both under indictments for similar offenses in Chicago. While evidence of this fact would not have been admissible upon the trial, it may fairly be considered in the decision of the pending motion.

A large portion of the papers submitted by the defendant relates to the good character of the company itself. This was never an issue in the case, and if evidence of this kind had been offered at the trial it would have been excluded. In fact, if the company had been engaged in a legitimate business, with valuable rights to sell, and if the defendant had sold these rights fraudulently and by false pretenses, it is no extenuation of his guilt, but rather an aggravation, because it gave him the better basis for deceiving his victim.

In the case of Kring v. N. Y. C. & H. R. R. R. Co., 45 App. Div. 378, the court says:

"The rule which should govern in considering a motion of this kind is well settled. It must appear that the evidence has been

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discovered since the trial; that it could not have been obtained upon the former trial by the exercise of reasonable diligence; that it is material to the issue and goes to the merits of the case; that it is not merely cumulative, and that its character is such that it would probably have changed the result."

The defendant in his moving papers does not meet any single one of these conditions.

Good character is not an excuse for crime, nor a license to commit it; and proof thereof is only useful and competent as enabling a jury to come to a just conclusion as to whether the defendant committed the act which constitutes the crime, and with guilty intent. There may be cases where such proof would, of itself, create such reasonable doubt as would call for an acquittal.

The motion is denied.

Motion denied.

ALFRED NOLAN MARTIN, Plaintiff, *v.* THE PRESS PUBLISHING CO., Defendant.

(Supreme Court, Kings Trial Term, April, 1903.)

Libel — Complaint — If plaintiff select and complain on a particular meaning for the words he is bound by it and cannot on the trial fall back on another meaning — Special damages.

In libel the plaintiff may always avoid a meaning of which the words complained of are susceptible by confining his complaint to a particular meaning of them, but he is bound by the meaning he selects and if he fails on it he cannot fall back on the general meaning of the words.

No special damages are alleged in a complaint unless the items thereof are alleged.

MOTION for a new trial, the complaint having been dismissed for not stating facts sufficient. The action was for libel, the words alleged in the complaint being as follows:

"SAVANT CANNOT MAKE A LIVING. OLD OXFORD PROFESSOR AND FAMILY IN SAD STRAITS."

"That the battle for existence is not won by brains alone is illustrated by the sad plight of Prof. Alfred Nolan Martin at

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Richmond Park, Staten Island. A man of extraordinary attainments in classical learning and once a professor in Oxford University, he is now in sad straits because his education hampers him in earning a living. He is living with his young wife and two small children in a house which has not a single door or window inclosed. He is too poor to finish his dwelling and too proud to ask aid. His neighbors say he is starving.

"In his life, he is now over fifty — Prof. Martin has been, besides an Oxford professor, a sanitary engineer, a lecturer, a social agitator, a school teacher and an author. Seven years ago, while with the Staten Island Health Department, he married Miss Cooper of Stapleton, a graduate of the New York University Law School. Then he lost his place".

The allegation of publication being followed by the following:

"thereby meaning and intending to charge this plaintiff with neglect in the support and maintenance of his said wife and children, and thereby meaning and intending to charge this plaintiff with reducing his said wife and his said children to starvation and not procuring for, and giving to them, the necessaries of life; and thereby meaning and intending to charge this plaintiff with conducting and managing his said home at Richmond Hill in the Borough of Richmond, in the City and State of New York in an uncivilized, unnatural and improper manner; and thereby meaning and intending to have it understood and believed that this plaintiff has been guilty of inhuman, unnatural, improper and disgraceful conduct, and thereby injuring and destroying his character and bringing him into disrepute and disgrace."

Ira Leo Bamberger for plaintiff.

Mirabeau L. Towns for defendant.

GAYNOR, J.: The complaint is not founded on the alleged libelous words in their general meaning (i. e., in all the meanings they are susceptible of), but on particular meanings which are alleged in the complaint. It is not necessary, therefore, to see whether the words will bear any libelous meaning other than those alleged in the complaint. The plaintiff in an action for libel may always avoid an issue on a meaning of which the words

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are susceptible by confining the complaint to another meaning or other meanings only. If, however, he is not content to sue on the words in their general meaning, but picks out and alleges a particular meaning in his complaint, and complains of that meaning only, he must, under our system of pleading, rest upon that meaning alone on the trial. If he fails on that meaning, he cannot fall back on the general meaning. The meaning complained of in the complaint is obviously the only meaning the defendant has to plead to and meet at the trial. He is not called upon, for instance, to plead and prove in justification the truth of the published words in a particular and meaning not complained of at all (Wuest v. Brooklyn Citizen, 38 Misc. Rep. 1; Westbrook v. New York Sun Assn., 32 id. 37; Smid v. Bernard, 31 id. 35).

The published words in this case are not susceptible of the particular meanings alleged in the complaint; and therefore the complaint does not state a cause of action. They do not charge the plaintiff "with neglect in the support and maintenance of his wife and children", or "with reducing" them "to starvation and not procuring for and giving to them the necessaries of life", or "with conducting and managing" his home "in an uncivilized, unnatural and improper manner", or that he was "guilty of inhuman, unnatural, improper and disgraceful conduct", as is alleged in the complaint. They convey the opposite meaning, i. e., that instead of neglecting his family, or sinning against them in any way, the plaintiff was loyal to them and did his best for them.

It is now suggested that special damages are alleged in paragraph seventh of the complaint, and that therefore the complaint is sufficient, even though the words be not a libel *per se*. But, as already pointed out, the complaint alleges and is based exclusively upon meanings which do not exist, and therefore no damage of any kind can be predicated thereon. Moreover, paragraph seventh does not allege any items of special damage, and that is the only way that special damage can be alleged. The particular contracts, sales, employments, customers, etc., lost or prevented have to be specifically alleged, giving names, dates, etc. (Cruikshank v. Bennett, 30 Misc. Rep. 232; Smid v. Bernard, 31 id. 35).

The motion is denied.

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TOWNSEND WANDELL et al., as Executors, Etc., Plaintiffs, *v.* SOPHIA HIRSCHFELD et al., Defendants.

(Supreme Court, New York Special Term, April, 1903.)

Costs — Under the general answer of an infant.

The interposition, upon the part of an infant defendant, of a general answer to the complaint raises an issue which requires proof, the resulting inquiry is a trial for the purposes of costs to the infant, and the trial is none the less one because the witnesses thereat were not cross-examined in the infant's behalf.

MOTION for a new taxation of costs.

Thomas W. Butts, for plaintiffs.

Ralph Nathan, for defendant Hirschfeld.

Hess & Holstein, for defendant W. J. Stafford.

Frank L. Crawford, guardian *ad litem,* for infant defendant Brown.

BISCHOFF, J. The infant's general answer so far placed the averments of the complaint at issue as to call for proof in support of the cause of action. The inquiry which resulted was a trial, for the purpose of the provisions of the Code relative to the allowance of costs. Roosevelt v. Schermerhorn, 32 Misc. Rep. 287. And this trial, originating in the joinder of issue, was not to become less of a trial, or no trial, because of the absence of cross-examination in the infant's behalf. A trial fee follows an inquest and does not depend upon the presence of an active controversy when the evidence in support of the case is presented to the designated tribunal. The hearing had in pursuance of the order of reference to take proof, after the service of the infant's answer, was a trial, for the purposes of the taxation of costs, and the items in question should be taxed. Motion granted. Order may be presented on notice.

Motion granted.

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JOHN A. PHOEBUS, Plaintiff, Judgment Creditor, *v.* DAVID WEBSTER et al., Defendants, Judgment Debtors.

(Supreme Court, New York Special Term, April, 1903.)

Supplementary proceedings — When an attorney must disclose a client's communication — Code Civ. Pro., § 835.

Where, after the claim of a judgment creditor had accrued, the judgment debtor transferred his house, representing nearly all his property, to his wife for one dollar, and she borrowed money on the house and died and by her will made him her sole beneficiary for life, the court held that an attorney for the wife, who had received from her a considerable part of the money she borrowed on the house, must disclose to the unpaid judgment creditor why he received the money and what disposition had been made of it, and this because the attorney, upon receiving the money, became her agent or attorney in fact as to it and to that extent lost his privilege to refuse, under Code Civ. Pro., § 835, to disclose a communication made him by her, his client.

The attorney cannot be excused from answering upon the ground that the money belongs to the wife's estate.

PROCEEDINGS supplementary to execution.

Ingram, Root & Massey (Paul Armitage, of counsel), for judgment creditor.

George A. Strong, for judgment debtor and for Mrs. Webster.

BLANCHARD, J. This is a proceeding supplemental to execution. After the claim in question arose the judgment debtor transferred his house, which was nearly all the property he possessed, to his wife for the consideration of $1. Some time thereafter the wife borrowed $45,000 and gave a mortgage on the house to secure its payment. Later she died, leaving a will whereby she created a trust and made her husband, the judgment debtor herein, sole beneficiary during his life. On his examination the judgment debtor testified as to the disposition of the

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$45,000 which his wife had borrowed, and stated that $15,000 thereof had been given to his wife's lawyer, but for what purpose he did not know. The lawyer was then called as a witness and he was asked if he had received the $15,000 from the judgment debtor's wife, if he still had any portion of it, if there was any agreement between him and his client in relation to it, and, if so, to state its terms. He was also asked if he had given any consideration for the $15,000, and whether, at the time or prior thereto the fund was placed with him, anything was said by his client or any one representing her in regard to the purpose or object for which it was placed with him. The witness refused to answer the questions on two grounds. First, that they seek from the witness a violation of professional privilege as attorney and a violation of the statute. The statute referred to is section 835 of the Code of Civil Procedure, which declares that an attorney or counselor-at-law shall not be allowed to disclose a communication made by his client to him or his advice given thereon in the course of his professional employment. It will be observed that the statute merely relates to communications by the client and advice by the attorney or counselor, and by no reasonable construction can it be held to extend to every possible transaction between an attorney or counselor and his client. Whenever an attorney or counselor-at-law receives money or other property of his client he becomes, to that extent, an agent or attorney in fact, and when interrogated concerning the disposition of such money or property he is bound to answer. As was said in the case of Foster v. Wilkinson, 37 Hun, 242–244: "It would be a strange rule which should permit attorney and client to enter into mutual contracts and be exempt from testifying as to their consideration and integrity, when attacked by creditors. Such a rule would enable persons to perpetrate the grossest frauds without the possibility of detection." In accepting $15,000 I think the attorney became an agent or attorney in fact, and thereby, to that extent, lost his privilege, and that he may be interrogated concerning his disposition of it. The second ground of objection is that the questions seek to inquire into matters that relate in no way to the judgment debtor's property, but solely to the property of the deceased wife. In answer to this objection it must not be overlooked that the judgment debtor transferred the house to his wife after this claim arose, and, therefore, as to this claim the

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conveyance was presumptively fraudulent. A man cannot give property to his wife and thus deprive creditors of their rights and remedies. The law insists that he shall be just to his creditors before being generous; and the judgment debtor failed in this respect. As great latitude is allowed in supplementary proceedings, the purpose of which is to trace the property of a debtor, I am of the opinion that the judgment creditor is entitled to find out what has become of the $15,000 placed in the hands of the witness, and especially so as no harm can result from such inquiry to the wife's estate. If the witness has any property in his possession or control belonging to the judgment debtor or in which the judgment debtor has a beneficial interest he is bound to disclose the fact. The objections are overruled and the witness is directed to answer.

Objections overruled and witness directed to answer.

THE DEGNON-McLEAN CONSTRUCTION CO., Plaintiff, *v.* THE CITY TRUST SAFE DEPOSIT AND SURETY COMPANY OF PHILADELPHIA, Defendant.

(Supreme Court, New York Trial Term, April, 1903.)

Interest — Money paid, laid out and expended.

Where subcontractors agree to but fail to furnish, for bridge tower foundations, granite from a quarry cut, to a certain extent, to required size and shape, and the contractor notifies the subcontractors' surety of the default, offers to allow it to furnish the granite, procures a number of bids from dealers, submits them to the surety and accepts the lowest bid, the contractor is entitled, where the contract stipulates that upon the subcontractors' failure to perform the contractor may procure the required stone elsewhere and recover the difference between the contract price and the excess cost, to recover as against the surety that cost as money paid, laid out and expended for the subcontractors and the contractor is also entitled to interest thereon.

ACTION upon contract.

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Parker & Aaron, for plaintiff.

Frederic J. Swift, for defendant.

CLARKE, J. Price & Garrison contracted with plaintiff to furnish it certain granite at specified prices for the construction of the tower and anchorage foundations of the Brooklyn end of the new East River bridge, which plaintiff was under contract with the city to build. The defendant guaranteed to plaintiff the performance by Price & Garrison of their contract. Price & Garrison failed to perform. Plaintiff procured the granite elsewhere, and now brings an action against defendant on its bond to recover the difference between what it actually paid for the granite and what it would have been required to pay to Price & Garrison under their contract if they had performed. Plaintiff had a verdict, and a question of law was reserved as to whether interest should be added to the amount found due by the verdict from the date of demand. Defendant claims that as the damages were unliquidated and as the granite had no market value interest is only recoverable from the time of the judgment. It seems to be the settled rule in this State that in an action to recover unliquidated damages for a breach of a contract, interest is not allowable unless there is an established market value of the property, or means accessible to the party sought to be charged of ascertaining by computation or otherwise the amount to which the plaintiff is entitled. Sloan v. Baird, 162 N. Y. 327; Gray v. Central R. R. Co. of N. J., 157 id. 483. I have examined the cases cited on defendant's brief in support of the claim that applying this rule to the case at bar interest is not recoverable. There is a marked difference in the facts. In each of those cases there was a breach of an executory contract, and the damages sought to be recovered were really unliquidated and unascertained. They were in the nature of loss of prospective profits. In the case at bar a clause of the original contract between Price & Garrison and plaintiff provided: "Should the parties of the second part (Price & Garrison) fail to promptly deliver granite stone as needed by the party of the first part and as required hereunder the party of the first part may procure any required stone elsewhere, and in the event that the cost of the stone procured shall exceed the price herein named the excess so paid shall be paid by the parties of the second part." When

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Price & Garrison failed to deliver, and when they notified plaintiff that they would not and could not perform, plaintiff obtained bids from a number of granite dealers, notified defendant of Price & Garrison's default, asked it if it desired to furnish the stone, submitted the bids it had received, offered any information required and then accepted the lowest bid offered, and now seeks to recover the difference between the Price & Garrison contract and the amount actually paid by it. And this amount would seem, under the terms of the contract with Price & Garrison, to come under the category of money paid, laid out and expended for their benefit. Further, while granite of the style and quantity required did not have a market value in the ordinary acceptance of the word—that is, it was not a staple which could be bought ready made at any corner store, it being cut from the quarry to a certain extent to required size and shape—yet the furnishing of the detailed bids to defendant, the request for it to supply the stone, the acceptance of the lowest offer and plaintiff's offer to furnish all the information required seem to me to bring this case squarely within the rule that the "means are accessible to the party sought to be charged of ascertaining by computation or otherwise, the amount to which the plaintiff is entitled." Gray v. Central R. R. Co. of N. J., 157 N. Y. 483, was an action to recover damages for breach of contract to purchase an old steamboat, and the court found that for such a vessel there was not a market value in the ordinary sense of those terms. The court denied interest because the plaintiffs retained the property as their own and brought the action for damages upon the refusal of the defendant to perform its contract. But the court said: "When the defendant refused to perform its contract, the plaintiffs could have brought an action against it to recover the contract price of the vessel; in which case a recovery by them would carry interest. Or they could have sold the vessel for the account of the defendant and have brought an action to recover the difference between the amount realized upon the sale and the contract price, in which case a recovery would, also, carry interest." If under such circumstances a breach and a sale for defendant's account would carry interest, certainly a purchase for defendant's account must. This is not an action for loss of prospective profits, but to recover the actual loss of the difference between the contract price and the cost of supplying the deficiency. The verdict has established

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the damage at the amount sued for, and that the price paid was fair and reasonable, and that plaintiff used all the efforts that a reasonably prudent man would to get the stone at the lowest price he could to make the loss as small as possible. Defendant had due notice and full opportunity to ascertain the amount. Plaintiff is entitled to the interest from the time of demand, to be added to the verdict. Settle the amount and order upon notice. Extra allowance three and one-half per cent.

Judgment accordingly.

WILLIAM J. STENSON, Plaintiff, *v.* THE CITY OF NEW YORK, Defendant.

(Supreme Court, New York Trial Term, April, 1903.)

New York city — An "orderly" of the department of correction cannot recover a "keeper's" salary although detailed to do his work.

A person duly appointed in 1897 by the head of the New York city department of correction as an "orderly" in the workhouse on Blackwell's Island, but who in the next month was told by the warden of that workhouse to report at Hart's Island and who there performed for nearly two years the duties of a "keeper", an office having an annual salary attached, cannot recover of the city the difference arising out of the higher salary of a keeper where there is no evidence that the head of the department ever made any appointment of the orderly as keeper or delegated to the warden power to make it or ever had actual or constructive notice of it.

ACTION for salary.

J. W. Finch, for plaintiff.

G. L. Rives, Corporation Counsel, for defendant.

GILDERSLEEVE, J. The plaintiff was employed in the department of correction and he sues for the difference in pay between the amount actually received by him for his services and that which he claims is due to him for such services. The case was tried before the court, without a jury. About August 19, 1897, plaintiff was duly appointed an "orderly" in the workhouse on Blackwell's Island, at a salary of $300 a year. On or about Sep-

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tember 16, 1897, the warden of the workhouse looked over the list of employees and picked out plaintiff's name and told a subordinate to direct plaintiff to report to Hart's Island the next day for duty. Plaintiff did so report, and he claims that he there performed the duties of a "keeper" from September 17, 1897, to July 21, 1899. The defendant denies this in its answer, but there is evidence sufficient to sustain plaintiff's claim in this respect. The salary of "keeper" was $800 per annum. Plaintiff, however, during said period from September 17, 1897, to July 21, 1899, received only $300 a year, for which he duly receipted, and continued to receive such salary until about October 28, 1899, when he resigned his place "as orderly." He brings this action for $916.67, as the difference between the pay of an "orderly" and that of a "keeper," during the said period from September 17, 1897, to July 21, 1899. Under the then existing statutes (Charter of 1897, § 1543) the heads of departments had the power to appoint and remove the employees and subordinates in their respective departments. The head of the department of correction was the commissioner of correction. It is not pretended that the commissioner, either in writing or orally, appointed the plaintiff to the position of "keeper," or changed the amount of salary, as, under the statute, he had the power to do, subject to the approval of the board of estimate and apportionment. The only claim of plaintiff is that a subordinate of the commissioner, i. e., the warden, orally directed the assignment of plaintiff to duty as a "keeper." The position of "keeper" seems to have been an "office," within the meaning of the authorities, as the employment does not appear to have been transient, occasional or accidental, and the salary fixed was by the year. The position was not a menial one, such as a janitor or servant, nor was the incumbent a *per diem* laborer whose employment might be evidenced by a mere verbal direction to go to work at prevailing rates. It would, therefore, seem to come within the authority of the case of People ex rel. Barry v. Keller, 30 Misc. Rep. 52, where the late Justice McAdam used the following language, viz.: "The controlling authorities hold that an appointment to public office must be in writing, or in the form of a resolution of the appointing board duly entered in its records." In the case at bar not only was the alleged appointment not in writing, but it was not made, as we have seen, by the appointing officer, i. e., the

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commissioner. There is no evidence here that the commissioner delegated to the warden the power to make appointments or raise salaries, although apparently, under the charter of 1897, he could delegate such power of appointment to his subordinate. Charter of 1897, § 694. In the case of Graham v. City of New York, 33 Misc. Rep. 56, Mr. Justice McAdam wrote as follows, viz.: "In order to establish a legal demand against the municipality, even for services rendered, there must first be an employment by lawful authority." The learned counsel for plaintiff claims that in accepting plaintiff's services as "keeper," the city ratified the act of the warden. It is not shown, however, that the commissioner of correction ever received notice of such employment, either actual or constructive. It may be true that the warden had general supervision of both the workhouse at Blackwell's Island and Hart's Island, as claimed by plaintiff's counsel, but he had no authority, so far as here appears, to raise plaintiff from the position of "orderly," at $300 a year, to that of "keeper," at $800. In the case last above quoted, Mr. Justice McAdam proceeded as follows, viz.: "A person dealing with the agent of a municipal corporation has no right to presume that he is acting within the line of his duty, but must take care to learn the nature and extent of his authority. * * * The civil service rules, made pursuant to statute, * * * would be defeated entirely, if the courts were to hold that so long as one employed by a city official does work he is entitled to recover from the municipality irrespective of the question whether the employment was in accordance with, or in violation of such rules. Such a principle * * * would leave open the sole inquiry whether services had been rendered, and eliminate as irrelevant the question whether they were performed under a valid or illegal employment." The corporation counsel refers me to the case of McCunney v. City of New York, 40 App. Div. 482, where it was held that a person employed by a municipal corporation in a particular capacity, as to which the law has fixed the compensation, must be paid in that capacity, and not for work of different kind to which he may be detailed. The plaintiff's counsel claims that this case can be distinguished from the case at bar for the reason that "McCunney was a driver in the street cleaning department, whose salary was fixed by statute at a sum not to exceed $720 per annum, while Stenson's salary as 'orderly'

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was fixed by the commissioner, subject to the approval by the board of estimate and apportionment." In that case the late Justice Rumsey said: "The statute fixes the compensation for the position to which the man is appointed, and, when it is so fixed, the fact that he does work of a different kind is of no importance, because no party has a right to change the obligations which the statute creates." In the case at bar the salary was fixed by the commissioner, with the approval of the board of estimate, and the warden had no right to change the obligation which was thus created, so that the fact that plaintiff was detailed to do work of a different kind is unavoidable since such detail was not authorized by the commissioner or even brought to his knowledge. Under the circumstances of this case, and in view of the authorities above cited, I am of opinion that the complaint must be dismissed. Judgment accordingly. Give notice of settlement.

Judgment accordingly.

Matter of the Application of ALEX. BERTREND and Others for an Order to Vacate and Set Aside the Return and Canvass Made by the Town Board and Inspectors of Election of the Town of Potsdam, N. Y., Made on the 11th day of February, 1903, upon the Four Questions Submitted under Section 16 of the Liquor Tax Law, and for an Order Directing a New Town Meeting to be Held at which said Four Questions may be Submitted.

(Supreme Court, Saratoga Special Term, April, 1903.)

Liquor Tax Law — Recount — Parties to resubmission — Practice — Order therefor — Errors of election officials when disregarded.

Where hotel proprietors of a town apply to set aside the canvass and return of the votes cast at a town meeting upon the excise questions and for a resubmission of them, the court will not order a recount where that would be useless and impossible — it appearing that since the election the town clerk's office has been burglarized and the ballot box broken open with evident evil design.

The town board, being the canvassing board, is a proper party to such a proceeding as a board and its members are proper parties as individuals and will be allowed to intervene.

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In view of the provisions of the Liquor Tax Law (L. 1901, ch. 640, § 3) that no special town meeting for a resubmission shall be called until a petition therefor and an order of the court thereon has been filed with the town clerk, the filing with him of such a petition is not a condition precedent to an order for resubmission.

Where all the excise questions, except the pharmacist proposition, have been decided adversely to the selling of liquors and by majorities which cannot be overcome by counting the ballots in the manner most favorable to the propositions, the court will not set aside the canvass and return, for errors or illegal acts of the election inspectors in relation to the return and some of the ballots.

APPLICATION to set aside the return and canvass of the vote of the town on the local option questions voted upon at the last annual town meeting.

L. E. Ginn (Theo. H. Swift, of counsel), for petitioners.

W. G. Van Loon, for State Commissioner of Excise.

C. S. Ferris, for canvassing board.

HOUGHTON, J. The applicants are proprietors of hotels in the villages of Potsdam and Norwood, situated in the town of Potsdam, St. Lawrence county, and make this application to set aside the return and canvass of the vote of the town on the local option questions voted upon at the last annual town meeting. No point is made but what the various propositions, as provided by the Excise Law, were properly submitted and voted upon by the electors of the town.

There were 1,868 excise ballots cast, in the aggregate, in the three election districts in the town. In district No. 3 there were three spoiled ballots, not voted, which are not included in the above total. The town board certified that there was a majority of 112 against the selling of liquor by hotel-keepers, and 183 majority against saloons selling liquor to be drunk on the premises, and 221 majority against the selling of liquor not to be drunk on the premises. The pharmacist proposition was voted affirmatively. Out of the total number of ballots, there were returned as totally blank, in the first district 30, in the second district

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7, and in the third district 9, making 46 in all. Some of the ballots were blank as to certain propositions, and marked properly for or against other propositions. In district No. 1 there were either 72 or 74 ballots, and in district No. 2 there were 12 ballots, upon which the voter had voted both ways on some one proposition, and these ballots were treated by the inspectors as void ballots and were not counted for or against any of the propositions which were correctly voted. The inspectors did not mention these ballots in the figures of their returns, nor does it specifically appear that they were marked with the reasons for rejection and placed in a separate package as required by the Election Law. The original returns of the inspectors in district No. 1, presented to the town board, certified that on question No. 1 the total number of votes was 1,100, on question No. 2, 1,002, and on question No. 4, 1,024. The tally sheet and all of the affidavits show that in this district there were 30 totally blank ballots. On presentation of the return to the town board for the purpose of canvass, one of the inspectors, against the protest of the other, substracted these 30 blank ballots from the totals given, making new figures and crossing out the old ones certified to by the inspectors. In place of 1,024, opposite question No. 4, the figures 974 appear. It is plain that this number should be 994, for all the affidavits agree that what the inspector did was to subtract the 30 blank ballots from the totals given; besides, the vote is stated to be in the affirmative 467, in the negative 527, which make a total of 994 and leave a majority of 60 against, as stated.

The town meeting was held on the 10th of February, 1903, and the count and declaration of the vote by the town board were made on the following day. The ballots were placed in a box and remained in the custody of the town clerk for about a month, when some unknown person burglarized the town clerk's office and opened the box, and it is supposed tampered with the ballots. Without inspection, however, the box was sealed, and now remains in the condition it was after the burglary.

The applicants had a month in which to make an application for a recount, and the present application was not made until the fourteenth of April, about a month later. If the ballots had not been tampered with, I would order a recount; but it is apparent that that would do no good at the present time for there would

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be no certainty that the ballots remained as they were at the count. On the contrary, the presumption is that the ballot-box was broken open for the purpose of tampering with the ballots, either by abstracting some, or substituting others, or remarking them.

A recount being useless and impossible, it must be determined whether the original canvass shall stand, or whether it shall be set aside and a new submission of the excise questions ordered.

Notice was served by the applicants upon the State Excise Commissioner, as the law requires, and the court has permitted the town board to intervene, and in its behalf opposing affidavits have been submitted.

It is urged that the town board, which was the canvassing board, is not a proper party to these proceedings. I think the board as a board is a proper party, and that the board as individuals are proper parties. It cannot be that it was the intention of the Legislature to say that no one except the State Commissioner of Excise should have a right to be heard on an application of this character. While it is proper for him to be notified of the situation, and of what is transpiring with respect to license or no license, it is the community which has the right of local option that is interested. The applicants are interested in the decision of that question because they have property which is adversely affected by a vote of no license. Each citizen of the town also is interested as well, and has the right to have any questions arising submitted to the court.

It is claimed by opposing counsel that the court has no power to order a resubmission of the excise questions because no petition for a resubmission and a new town meeting has been filed in the town clerk's office. Section 16 of the Liquor Tax Law (L 1901, ch. 640, § 3) provides that no special town meeting shall be called until an order of the court for a resubmission shall be filed as well as such petition. Notwithstanding intimations in decisions to the contrary, I think the provision of the statute is so plain that I must overrule that objection and hold that the applicants in that respect are regular.

The applicants insist that the changing by one inspector of the returns from the first district, by subtracting 30 from each total certified and putting into the return such reduced total, nullifies the return and makes the subsequent canvass by the town

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board void. While this act was wholly unwarranted, and a thing which the inspector had no right to do, yet I do not think it had the effect of nullifying the return. No question is made but what on the fourth proposition, in district No. 1, 467 electors of the town voted in favor of a license to hotel-keepers, and 527 electors voted against it; and so of the other propositions as stated in the different numbers in the return. Any act of one inspector, or even the board of inspectors, after a count could not disfranchise these voters. Their wishes had been expressed by their ballots, and the result ascertained, and no negligent, or careless, or vicious act of a town official could override it.

In People ex rel. Hirsh v. Ward, 148 N. Y. 146, Chief Judge Andrews says: "Each voter received his ballot from the inspectors, marked it with the cross under the party name and emblem and returned it to the inspectors, by whom it was deposited in the box and subsequently counted. We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake or even the willful misconduct of election officers in performing the duty cast upon them. The object of elections is to ascertain the popular will and not to thwart it. The object of election laws is to secure the rights of duly qualified electors, and not to defeat them."

In People ex rel. Maxim v. Ward, 62 App. Div. 531, the inspectors of election had omitted to indorse upon the backs of ballots rejected as void their reason for such rejection, and had omitted to place such ballots in a sealed package and to file the same with the original statement of the canvass; and the court held that the election was not void, but that a peremptory mandamus should issue requiring the inspectors to perform their duties in those respects.

In Matter of Thacher v. Lent, 71 App. Div. 483, two ballots were discovered to be mutilated by having torn from the bottom strips containing the names of candidates. These strips were found in the box for detached stubs. The court held that such ballots must be counted because it was the carelessness of the inspectors in tearing off the stubs which mutilated the ballots, and that the voter should not be deprived of his vote by reason of such act on the part of officials.

In People ex rel. Guernsey v. Pierson, 35 Misc. Rep. 406, a recanvass of the votes on the local option questions was refused

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notwithstanding the fact that thirty-eight ballots were not accounted for, it being shown that these thirty-eight ballots were blank and void but not returned as such.

Applying the principles enunciated in the above cases, and bearing in mind that the electors of the town of Potsdam were in no way chargeable with the irregularities of the boards of inspectors and the town board of canvassers, I think this application must be denied.

The affidavits of all the inspectors of election in the various districts, except one in the second, have been submitted on one side or the other. The affidavits are all unanimous that the forty-six blank ballots were really blank, having simply been voted without any marking upon any of the propositions. So do the affidavits all state that the votes on the various propositions, for and against, which were actually returned, were correctly counted as set forth in the returns, and that the returns were absolutely correct so far as they went. These returns show that the least majority against any of the propositions was that of granting licenses to hotel-keepers, and that the majority was one hundred and twelve. Two of the inspectors in district No. 1 say that in that district seventy-two ballots were thrown out as void because of double marking. Mr. Peck, who makes an affidavit upon both sides of the question, says there were seventy-four. All agree that in district No. 2 there were twelve of such ballots rejected as void. In district No. 3 such ballots were counted for or against the propositions properly voted. Assuming that Mr. Peck is correct, and that there were seventy-four ballots rejected in district No. 1, there would then be eighty-six ballots thus improperly rejected and defectively returned. It is hardly probable that all of these ballots showed affirmative votes on the question of issuing license to hotel-keepers. But assume that they were all in the affirmative, and counting them as such, still the no license proposition in the case of hotel-keepers would be defeated by twenty-six majority. Counting all such ballots in the affirmative for the other propositions would, of course, leave them defeated even by a greater majority. It is, therefore, manifest that the electors of the town in a very large and representative vote, defeated the excise questions in controversy by substantial majorities, after counting the disputed ballots in the most favorable manner to the applicants.

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These eighty-six ballots should have been returned by the inspectors and included in their totals of the whole number of votes cast. It is said that the excuse for not returning them was that in the blank returns provided by the town clerk no columns for such return appeared. This, however, did not relieve them from following the plain direction of the statute. It may also be that in the figuring of the votes cast upon the various propositions the inspectors were not as clear as they might have been. Not all the ballots were voted alike upon all the propositions. Some were not voted at all; others were voted in favor of, with a part against. But whatever the situation, it finally comes down to the eighty-six ballots rejected as void and not returned.

The electors of the town should not be deprived of their choice in the matter of license by the acts of the inspectors, which could not change the result, nor should the town be put to the expense of a resubmission of the questions by a special town meeting. Whether the town voted wisely or not upon the question of license to hotel-keepers is of no moment. It is unfortunate that any mistakes were made by the inspectors. It appears quite clear from the affidavits submitted that the electors of the town voted against the three propositions for issuing license, and that by no process of counting could any one of the propositions receive an affirmative majority. The carelessness or misconduct of the inspectors of election or canvassing board should not and does not, I think, defeat the will of the electors as expressed by their votes.

The application must be denied, with ten dollars costs.

Application denied, with ten dollars costs.

Matter of the Estate of SOPHIE ROSENDAHL, Deceased.

(Surrogate's Court, New York County, April, 1903.)

Transfer tax.

Where a testator wills to his sisters and a nephew property of the value of $663.78, the share of the nephew, amounting to $291.31, is taxable under article X of the Tax Law because property of the testator of the value of $500 or over has been transferred to persons not specifically exempted from the transfer tax.

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APPEAL from an order fixing and assessing the transfer tax.

S. H. Steinberg, for executrix.

Edward H. Fallows, for State Comptroller.

THOMAS, S. The amount of this estate is $663.78, of which $372.39 passes under the will to sisters of the decedent, and $291.31 to a nephew. It is contended on behalf of the nephew that the estate is exempt from transfer tax, the transfer to him not being taxable, according to his contention, because the taxable interests do not amount to $500. The decision in Matter of Bliss, 6 App. Div. 192, where the same question was passed upon, supports his contention, and has been recently followed by the surrogate of Suffolk County in Matter of Conklin, 39 Misc. Rep. 771.

The theory of these cases was that near relatives of the decedent, enumerated in section 221 of the Tax Law, whose legacies are, by the statute, not subject to any tax unless the aggregate of legacies to persons of that class amounts to $10,000, are "persons specifically exempted from the provisions of" the act, if the legacies passing to them aggregate less than that sum. This precise question has received further consideration in the later case of Matter of Corbett, 171 N. Y. 516, affg. 55 App. Div. 124, and was decided the other way both in the Appellate Division and in the Court of Appeals. It was determined that "a brother and a sister, and all those persons named in section 221, are not 'exempted from * * * the provisions of this act.' They are taxable persons under the act. The same section does specifically exempt from the 'provisions of this act' a bishop and a religious corporation." 55 App. Div. 127. I am bound by this latest utterance of our highest court to hold that the Bliss case is overruled and that the other decision made on its authority is erroneous.

The property passing from the decedent to taxable persons exceeded $500 in value, and the transfer to the nephew must be taxed.

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Matter of the Proof of the Will of MICHAEL GOLDEN, Deceased.

(Surrogate's Court, Rensselaer County, April, 1903.)

Residence — Change of.

A testator, who had lived for forty years in Troy, Rensselaer county, went to Saratoga, in April, a place where he spent his summers. He made a will there in June in which he was described as of Troy and in August made another will there in which he was described as of Saratoga. The latter will gave a woman of Saratoga, with whom he had boarded for many years when visiting there in summer, all his property provided she took care of him for the rest of his life. He also requested and paid for an addition to her house so that he could have a warm and comfortable room. He expressed to several persons an intention of living in Saratoga for the rest of his life. He died there in September. Upon an attempt to prove the June will in Rensselaer county,

Held, that he died a resident of Saratoga county.

PROCEEDING upon the probate of a will.

Cornelius Hannan, for executor and petitioner.

Hiram C. Todd, for executor of subsequent will.

F. A. Chew, for heirs-at-law and next of kin.

HEATON, S. This is an application for the probate of the alleged will of deceased made in June, 1902. On the return of the citation Thomas Healy, of Saratoga Springs, N. Y., appeared and asked to have the petition dismissed upon the ground that he was the executor named in an alleged will of deceased executed in August, 1902, which had been offered for probate in Saratoga county, which county he claimed was the place of residence of Mr. Golden at the time of his death in September, 1902. The residence of the testator being thus brought in question, testimony was, therefore, taken upon such issue.

It is admitted that up to April 19, 1902, and for more than forty years prior thereto Mr. Golden had been a resident of the

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city of Troy. That he was upwards of eighty years old, and that the last one of his immediate family, a son, had died in Troy about February, 1902, and that in the following month he had sold his real estate and shortly after that his household furniture, excepting one bed and lounge. That he had his money on deposit in Troy. That he had made arrangements for living there and at any future time with a former tenant of his house, who had cared for him and his rooms for several years.

For twenty-five years Mr. Golden had been spending his summers in Saratoga, and for the prior eight or ten years he had boarded when there with Mrs. Healy. Just before April nineteenth, he sent for Mrs. Healy to come for him, and on that day they went to Saratoga where he remained at her house until he died.

His residence once established in Troy remained there until he had made another. As he lived in Saratoga for five months the only question is whether he intended to change his residence from Troy to Saratoga.

There is no evidence that when he left Troy, April nineteenth, he intended to abandon Troy as a home and change his residence to Saratoga, so if he did intend to make such change his intention must be found in his subsequent acts, which principally were as follows:

Requesting and paying for an addition to the Healy house so that he might have more room and more comforts; removing his money from a Troy bank to a Saratoga bank; conversations with several persons in which he expressed an intention of spending the rest of his days in Saratoga; making the August will which recited his residence as being in Saratoga, and making Mrs. Healy the sole beneficiary on condition that she should care for him the balance of his life.

As against these expressions of intention we have the conversations with Mr. Hannan and Mr. Kennedy at the time of making the June will, and the recitation in such will that his residence was Troy.

The statements of residence in a holographic will are entitled to great weight, but in one prepared by an attorney where he inserts the place of residence as in part a matter of form such statement is not controlling. Matter of Brant, 30 Misc. Rep. 14, 62 N. Y. Supp. 997.

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But the statement in the August will that Mrs. Healy should have the entire estate upon condition that she should care for him the balance of his life shows almost conclusively that Mr. Golden had at that time determined to live in Saratoga until he died. Whatever may have been his intention when he made the former will in June and even at a late day, almost his last act on August twenty-seventh was to express his intention to live in Saratoga and be cared for by Mrs. Healy as long as he should live.

Another strong expression of intention to change his residence is found in his requesting and paying for an addition to the Healy home, so that he could have a warm and comfortable room, which would seem to indicate an intention to occupy such room in the winter season. While the question of intention is often a difficult one to determine, the evidence in this case warrants no other conclusion than that Michael Golden was at the time of his death a resident of the county of Saratoga.

Proceeding dismissed with leave to withdraw the June will from the custody of the court.

Proceeding dismissed.

BERNARD McMAHON, Respondent, *v.* MARY HOWE, Appellant.

(County Court, Saratoga County, April, 1903.)

Summary proceedings — Notice to tenant — "Re-enter" construed — Jurisdiction.

A notice served in summary proceedings by a landlord upon a tenant, in default for rent reserved in a lease, merely stating the amount due and that the relation of landlord and tenant has ceased and requiring the tenant to remove, is unauthorized as in such case the notice is required by Code Civ. Pro., § 2231, subd. 2, to be in the alternative, for payment of the rent or possession of the premises.

A lease reserving to the landlord the right merely to "re-enter" on default entitles him to maintain ejectment against the tenant but not summary proceedings.

A justice of the peace has no jurisdiction of an action of ejectment.

APPEAL from a judgment of the justice's court in favor of plaintiff.

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Misc.] County Court, Saratoga County, April, 1903.

Frederick B. Phillips, for appellant..

Ostrander & Salisbury, for respondent.

ROCKWOOD, J. A written lease was entered into by the parties hereto on or about March 30, 1901, by which the respondent leased to the appellant certain premises known as the "St. Nicholas Building" together with two barns, in the village of Schuylerville, N. Y., for the term of one year to commence on the 1st day of April, 1901, and to end on the 31st day of March, 1902, at an annual rent therein specified. The lease contained the following covenant: "And the party of the second part further covenants that if default be made in the payment of said rent or any part thereof at the times above specified, or if default be made in the performance of any of the covenants or agreements herein contained, the said hiring and the relation of landlord and tenant, at the option of the said party of the first part, shall wholly cease and determine and the said party of the first part shall and may re-enter said premises and remove all persons therefrom, and the said party of the second part hereby waives the service of any notice in writing of intention to re-enter, as provided by law or statute."

On December 3, 1901, the respondent, landlord, caused to be served upon the appellant, tenant, a notice in writing reciting the terms of the lease; that $100 of rent had accrued and remained unpaid; and notice was thereupon given "that the relation of landlord and tenant shall wholly cease and determine, and does hereby cease and determine, and I demand that you forthwith remove from the said premises and deliver the same to me as provided by said lease and as provided by law."

The terms of this notice not being complied with, respondent thereupon filed his verified petition with a justice of the peace of the town of Saratoga, praying that a final order should be granted to remove the said Mary Howe from said premises "according to the statute in such case made and provided." A precept was issued by the justice, directing the appellant to remove from the premises or show cause at a time specified why possession thereof should not be delivered to the petitioner. At an adjourned day the appellant made a special appearance by counsel and objected to the regularity of the proceedings and the jurisdiction of the court.

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These objections were overruled, the defendant answered, a jury trial was had resulting in a verdict in favor of the petitioner, whereupon the justice entered judgment in favor of the respondent, awarding him the possession of the premises described in the petition with seven dollars and eighty cents costs. From this judgment the defendant, Mary Howe, has appealed to this court.

At the outset it appears that the landlord relied upon the terms of his lease. The notice served by him was not in the alternative, requiring the payment of the rent within three days or the possession of the property, but it in terms treated the default as a termination of the relation of landlord and tenant. Section 2231 of the Code of Civil Procedure prescribes the form of notice to be given where a tenant holds over without the permission of the landlord after a default in the payment of rent and it is clear that the notice given in this case did not conform to the requirements of that section. The notice prescribed by section 2236 is not applicable here because the appellant was neither a tenant at will nor at sufferance.

Regardless, however, of the form of the notice or of any defect therein, it is doubtful if the landlord, under his lease, was legally entitled to maintain summary proceedings for the recovery of the possession of his property. The lease as above quoted reserves to him the right to "re-enter." This right has been fully construed and elucidated in Michaels v. Fishel, 169 N. Y. 381. In that case the court considered whether the word "re-enter" in addition to its technical common-law meaning included also the right to remove the lessee by summary proceedings. It was held, in substance, that the word "re-enter" at common law simply invests the landlord with the right to maintain ejectment, and that this rule has not been changed by statute. It is true that this decision was reached by a divided court, but, until modified or distinguished, it is nevertheless controlling upon this appeal. The principal therein established is clearly applicable to the case at bar, because the lease does not save to the landlord the right to institute summary proceedings, and the word "re-enter" in the lease must be given its full legal definition and significance. Hackett v. Richards, 13 N. Y. 138; Van Rennselaer v. Jewett, 2 id. 141.

The Code of Civil Procedure (§§ 1496 *et seq.*) defines the remedy by an action of ejectment and prescribes the procedure.

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It is not an action of which a justice of the peace may take cognizance and the justice was, therefore, without jurisdiction to enter the judgment against this defendant.

Various other interesting questions are suggested by the record in this case but will not be discussed, as the decision already reached precludes the necessity of so doing.

The judgment appealed from must be reversed, with costs to the appellant against the respondent.

Judgment reversed, with costs to appellant against respondent.

MATHIAS RUOFF as Administrator of JOHN RUOFF, Deceased, Plaintiff, *v.* THE GREENPOINT SAVINGS BANK, Defendant.

(Supreme Court, Kings Special Term for Trials, May, 1903.)

Presumption of death — Evidence — Common-law rule.

At common law seven years' absence of a person without intelligence concerning him rebuts the presumption of a continuance of his life and raises a presumption of his death.

Letters of administration are in and of themselves *prima facie* evidence of the death of the person on whose estate they are granted.

ACTION to recover a deposit made with the defendant by John Ruoff.

The complaint alleges that the depositor, John Ruoff, is dead, and that the plaintiff was appointed his administrator, and the answer denies each of these allegations.

William C. Beecher for plaintiff.

Albert G. McDonald for defendant.

GAYNOR, J.: The only facts in dispute being that John Ruoff, the depositor, was dead and that the plaintiff is his administrator, the plaintiff introduced in evidence the surrogate's letters of administration to him, and rested. The defendant thereupon introduced the petition of the plaintiff, and his accompanying affidavit, on which the surrogate granted the letters, and rested. The peti-

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tion is dated October 27th, 1902, and states that the depositor was a brother of the petitioner, unmarried, and had long resided with him, and worked for him; that he secretly left his home early in the morning on June 8th, 1894, and has not been heard of since; that for some time prior thereto he had been subject to attacks of melancholy; that he was home abiding and regular in his habits; that he was frugal and saving, and had over $5,000 in different savings banks when he left, and that such deposits have since remained untouched by him; that the night before he left he handed $300 in bank bills to the petitioner, and asked him to keep it; that the petitioner made inquiries concerning him at the morgue, lunatic asylum and other like public institutions, and of friends and relatives, but was unable to find him or hear of him. The affidavit fortifies the petition by a similar statement of facts.

It is objected by the defendant that the plaintiff gave no evidence of death; but the letters of administration are in and of themselves *prima facie* evidence of death (Carroll v. Carroll, 60 N. Y. 121).

In *Roderigas* v. *East River Savings Institution* (63 N. Y. 460), it was held that letters of administration granted by the surrogate on a petition stating facts from which death could be judicially inferred, are conclusive evidence of the right of the administrator to act, and that although the alleged decedent was in fact alive, he was bound by the acts of such administrator in collecting his bank deposits, and the bank was released thereby; and this was adhered to in a later case between the same parties (76 N. Y. 316). The common law was the contrary, viz., that the jurisdiction of the surrogate depended on the fact of death; but the decision was placed on the particular wording of the statute relating to the granting of letters by surrogates in this state. The case of *Scott* v. *McNeal* (154 U. S. 34), however, has overruled the *Roderigas* case (Matter of Killan, 172 N. Y. p. 557), on the ground that such a statute is void for violating the prohibition of the Fourteenth Amendment to the Constitution of the United States against any State depriving any person of life, liberty or property without due process of law, or denying to any person the equal protection of the laws; and as the question made may be a Federal one by reason of the said constitutional amendment, this decision is binding on our state courts.

The present case has therefore to be decided without regard to

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the *Roderigas* case, and on common law principles; and as the letters are at common law *prima facie* evidence of death, the plaintiff is entitled to recover, unless the petition and affidavit on which they were granted, which were introduced in evidence by the defendant, rebut such evidence. They certainly do not do so, unless the said absence of seven years does not destroy the ordinary presumption of a continuance of life, and raise instead a presumption of death; for in that case the letters would be shown to rest on no evidence of death, and to be therefore void. But such seven years absence does at common law raise a presumption of death (1 Greenleaf Ev., § 41; Davie v. Briggs, 97 U. S. p. 633; Karstens v. Karstens, 29 App. Div. p. 235, *note*).

Judgment for the plaintiff.

ETHEL LEONOROVITZ, Plaintiff, *v.* MARY OTT, Defendant.

(Supreme Court, Kings Special Term for Trials, May, 1903.)

Animals — Liability of the owner of a vicious dog to a trespasser — Defense not demurrable for not containing denials.

It is not an affirmative defense to a complaint against the defendant, for knowingly keeping a vicious dog which when at large bit the plaintiff, for the defendant to answer that the plaintiff was a trespasser upon the defendant's premises at the time when the plaintiff was bitten.

Denials of allegations of the complaint being no part of a defense it cannot be held bad on demurrer for not containing denials.

TRIAL of an issue of law raised by a demurrer to matter pleaded as an affirmative defense to the complaint.

The complaint is that the defendant knowingly kept a vicious dog, and allowed it to be at large, and that it bit the plaintiff.

After what purport to be denials, comes the following, pleaded as a defence, in the answer:

"That at the time and place mentioned in the complaint the plaintiff was a trespasser, and unlawfully upon the premises of the defendant, and that whatever damages or injuries she sustained, if any, were the result of the wrongful, negligent and unlawful act of plaintiff".

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Isaac Sargent for plaintiff.

Howard C. Conrady for defendant.

GAYNOR, J.: The decision in *Saleeby* v. *Central R. Co.*, 40 Misc. Rep. 269, is cited, in which it is said: "I think the affirmative defenses are further faultily pleaded in that they fail to contain any sufficient denial of the allegations of the complaint, which, under such conditions, must, for the purpose of the demurrer, be taken as true." This is so strange that I must regard it as in some way a mistake of the editor or printer. Denials of allegations of the complaint cannot be a part of a defence. If put there they would be struck out on motion. A defence can consist only of "new matter", i. e., matter outside of any issue raised, or that may be raised by a denial, and which, taking all of the allegations of the complaint to be true, is nevertheless a defence to the action, such as payment, a general release, fraud, the truth of a libelous publication, etc. (Code Civ. Proc., § 500; Burkert v. Bennett, 35 Misc. Rep. 318). Its sufficiency has always to be tested on the assumption that all of the allegations of the complaint are true. How odd, then, to suggest that a defence may be deemed bad on demurrer for having no denials in it.

That the plaintiff was a trespasser on the defendant's premises when bitten is no defence. One who allows a biting dog to go at large, knowing it to be such, is liable if it bite a trespasser (Loomis v. Terry, 17 Wend. 496; Kelly v. Tilton, 3 Keyes, 263). The remaining words of the so called defence, viz., "and that whatever damages or injuries she sustained, if any, were the result of the wrongful, negligent and unlawful act of the plaintiff", seem to refer to the plaintiff's trespass. If not, they are mere hard words, which amount to nothing in pleading, as much as some learned pleaders seem to love them.

The demurrer is sustained.

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THE PEOPLE ex rel. ANTON DUFOUR et al., Relators, v. JAMES L. WELLS et al., as Commissioner of Taxes, Etc., Respondents.

(Supreme Court, New York Special Term, May, 1903.)

Tax — Form of assessment against a nonresident partnership.

An assessment against nonresident partners, for personal taxes, made in the firm name is void under the Tax Law (L. 1896, ch. 908, § 21, as amd. by L. 1899, ch. 712, § 3) as it governs and requires the assessment to be made against the partners as individuals.

MOTION to quash writ of certiorari.

Edmund L. Cole, for relators.

E. Crosby Kindleberger, for respondents.

BISCHOFF, J. The relators are nonresident copartners doing business as Dufour & Co., and have obtained a writ of certiorari to review an assessment for personal taxes, the ground of their petition being that the assessment has been made against "Dufour & Company," the firm, instead of against the partners as individuals. No objection to the assessment having been presented to the commissioners, the certiorari proceedings are maintainable only upon the theory that the assessment was void, since, if the commissioners acted within their jurisdiction, the relators' failure to present their objections first to them would defeat the proceedings. People ex rel. American Thread Co. v. Feitner, 30 Misc. Rep. 641; People ex rel. Rendrock Powder Co. v. Same, 41 App. Div. 544. The question of the validity of an assessment, in this form, is presented by the respondents' motion to quash the writ.

While the tax upon the personal property of nonresidents, which is employed in their business within the State, is deemed to be a tax upon the property itself rather than against the individual (City of New York v. McLean, 170 N. Y. 374), the assessment is regulated by the same provisions of law which apply to personal taxes upon the property of residents. Tax Law, Laws of 1896, chap. 908, § 7. The statute requires that the assessment shall be made in such manner as to describe the "person"

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taxed, and the value of the property of that "person," after deducting all the debts owing by him. Tax Law, § 21 (amd. L. 1899, ch. 712, § 3). In no possible aspect is a partnership a "person," nor is the aggregate property employed by the partners in the business property of a "person," nor is the firm's property the measure of each partner's interest for taxation. The property of each individual, lessened by his debts, is the basis of the tax. The law so provides, for the benefit of the taxpayer, and a strict compliance with the terms of the law, in the manner of making the assessments, is essential to the legality of the assessment. Cooley, Tax., 259, 260–280. Unless the statute provides to the contrary, an assessment for taxation of partnership property must be made in the names of the individuals composing the firm. Id. 271.

This assessment cannot be held irregular merely, and within the jurisdiction of the commissioners to make, upon resort to a construction of the statute which would render its provisions for the laying of assessments not mandatory but directory. The rule stated by the text-writers and supported by authority renders the validity of the assessment dependent upon compliance with the law in the initial steps which the law details, and there was certainly no compliance here. Westfall v. Preston, 49 N. Y. 349; May v. Traphagen, 139 id. 478; Sanders v. Downs, 141 id. 422.

But one scheme of assessment is provided by section 21 of the Tax Law, whether the tax is upon residents or nonresidents, and there is no authority for taxing foreign partnerships except in accordance with this section. Section 7, which refers to the power to tax nonresidents "doing business either as principals or partners," is not a regulation of the steps to be taken for the assessment and cannot possibly be given the meaning that nonresidents may be taxed as partners while residents may not. Unless section 21 is to be complied with, as governing the method of making assessments in all cases, a firm composed of both residents and nonresidents could be taxed upon the firm's capital, and the personal tax enforced by resort to the personal liability of one resident partner, a result which is certainly not intended by the Tax Law.

Motion to quash writ denied, with ten dollars costs.

Motion denied, with ten dollars costs.

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THE PEOPLE ex rel. THE MANHATTAN LIFE INS. CO., Relator, v. JAMES L. WELLS et al., as Commissioners of Taxes and Assessments of the City of New York, Respondents.

(Supreme Court, New York Special Term, May, 1903.)

New York city — Assessment of the realty of a domestic corporation — L. 1901, ch. 466, §§ 892, 893, 894.

An assessment duly made upon the real estate of a domestic corporation having its principal place of business in and owning real estate in the borough of Manhattan is valid and a lien upon the land where it has been entered in the "annual record of the assessed valuation of the real and personal estate of the borough", required to be kept by L. 1901, ch. 466, § 892, and the assessment need not be entered in the "annual record of the assessed valuations of real and personal estate of corporations", required to be kept by section 893 of said law, unless the city desires to collect the tax out of the personal property of the corporation.

Statement of the distinction between the two "annual records".

MOTION to quash a writ of certiorari.

M. F. Neville (Benj. F. Tracy, of counsel), for relator.

George L. Rives, Corporation Counsel (David Rumsey, of counsel), for defendants.

BLANCHARD, J. This is a motion by the defendants to quash a writ of certiorari to review an assessment upon real estate of the relator for the purpose of taxation for the year 1902. The petition shows that the relator was a New York corporation, with its principal place of business in the borough of Manhattan, and the owner of certain real property in said borough; that by section 893 of the Greater New York charter (L. 1901, ch. 466) it is provided that "The department of taxes and assessments shall cause to be prepared and kept in the main office of the department of taxes and assessments, books to be called 'The annual record of the assessed valuations of real and personal estate of corporations,' and it shall be the duty of the deputy tax commissioners in the several

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districts in the several boroughs which may be assigned to them for that purpose by the board of taxes and assessments, to furnish to the department of taxes and assessments, under oath at their main office, at the time such statement is filed in any office of the department of taxes and assessments in any borough other than the main office in the borough of Manhattan, a duplicate detailed statement of the assessable property of corporations, both real and personal, which said statements of said deputy tax commissioners shall be entered upon the books to be kept in the main office of the department of taxes and assessments, to be known as the 'Annual record of the assessed valuation of real and personal estate or corporations,'" and that by section 894 of said charter it is provided that "The assessed valuation of all real and personal property of corporations shall be entered in duplicate in the office of the borough where the same is assessed and in the main office of the department of taxes and assessments in the borough of Manhattan;" that a deputy tax commissioner valued and assessed the property of the relator and that the board of taxes and assessments illegally caused said assessment to be entered in a book required to be kept in the main office of said department in the borough of Manhattan, called "The annual record of the assessed valuation of real and personal estate of the Borough of Manhattan" for the year 1902, when the same should have been, but was not, entered in said "Annual record of the assessed valuations of real and personal estate of corporations" for the year 1902; that the "Annual record of the assessed real and personal estate" was open for examination and correction in accordance with the requirements of the law, and was properly advertised, but that the board failed to advertise that the "annual record of the assessed valuations of real and personal estate of corporations" was open for examination and correction; that the board delivered as required by law, to the board of aldermen an assessment-roll prepared from the annual record, which included the relator's real property, but that the board failed to deliver the "annual record of the assessed valuations of real and personal estate of corporations" containing an assessment against relator's real property; that the board of aldermen confirmed said assessment-roll, and that the tax imposed on relator's real property will become an apparent lien on its property and that said assessment is illegal and void.

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The contention of the relator, as the petition shows, is that the relator's real property was not entered in what it claims is the proper record, to wit, "the annual record of the assessed valuations of real and personal estate of corporations" in accordance with section 893 of the charter, before quoted.

In order to comprehend properly the situation as it is here presented, certain other sections of the charter should be considered. Section 892 provides that "There shall be kept in the several offices established by the department of taxes and assessments books to be called 'the annual record of the assessed valuation of real and personal estate of the borough of .....' in which shall be entered in detail the assessed valuations of such property within the limits of the several boroughs of The City of New York as established by this act, which said books shall be open for public inspection, examination and correction from the second Monday in January until the first day of April in each year; but on said last mentioned day the same shall be closed to enable the board of taxes and assessment to prepare assessment-rolls of the several boroughs for delivery to the board of aldermen. The said board previous to and during the time said books are open as aforesaid for inspection shall advertise the fact in the 'City Record;' and in such other newspaper or newspapers published in the several boroughs created by this act as may be authorized by the board of city record."

The petition shows that the relator's real property was properly assessed in accordance with law, provided it need not be entered in the record of corporations called for by section 893 of the charter. It will be observed that the record which section 892 requires to be kept, "the assessed valuation of real and personal estate," makes no exemption of the property of corporations. This record, it will be further observed, is required to be kept in the various boroughs in which the property is located, and this is the record which must be kept open for public inspection after notice is given by advertisement. When we take up section 893 for examination we find that the "record of the assessed valuations of real and personal estate of corporations" there provided to be kept at the main office of the board of taxes and assessments is made up of duplicate records from the various boroughs. It will be observed that this record is not required by this section to be kept open for public inspection, nor must notice be pub-

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lished as section 892 requires of the more general and comprehensive records required to be kept by virtue of that section. The purpose of having this corporation record complete in the main office is apparent from a perusal of section 898, which requires applications for revision and cancellation of assessments of corporations to be made at the main office of the board, whereas other applications of a similar character are addressed to the deputy tax commissioners for the various boroughs.

Section 894 contains a provision pertaining to real property assessments, which has a most important bearing upon this application, and which is not referred to in relator's petition. It is as follows: "No tax or assessment shall be void by reason of the name of the rightful owner or owners, whether individuals or corporations, of real estate in any of the said boroughs not being inscribed in the assessment rolls or lists; but in such case no tax shall be collected except from the real estate so assessed." It is expressly stated that this provision applies as well to corporations as to individuals, and it must be held, therefore, to comprehend within its scope as well the record as to corporations required to be kept by section 893 as the more comprehensive records required to be kept by section 892. Section 893 should, therefore, be interpreted in the light of the portion of section 894, just quoted. Interpreting it in that way, section 893 does not require a record to be kept of the assessment against the real property of corporations in cases where the collection of the tax accruing from assessment is sought to be enforced solely against the land. In such cases the assessment directly against the land, as required by section 892, is sufficient, for it is unnecessary to ascertain who the owner is, since, by virtue of section 894, the tax is not void if the rightful owner's name is not correctly stated. Where, however, it is sought to enforce the collection of the tax accruing as a result of the assessment of the real property of a corporation against the corporation out of its personal property, and not to confine it to the enforcement of the lien upon the land assessed, then a compliance with the provisions of section 893 is necessary. Haight v. Mayor, 99 N. Y. 280. This is, in my judgment, the only rational interpretation of these sections, for it certainly cannot be intended to have the real property of corporations singled out for the purpose of having an entry thereof made against the corporation in a distinct record

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when it is unnecessary to ascertain who the owner of such property is. Should it be desired to collect the tax accruing as a result of the assessment of real property of a corporation out of the personal property of the corporation, then for that purpose a compliance with the provisions of section 893 is necessary, but it does not render the tax void, if the provisions of section 893 are not complied with, so far as the collection of the tax is concerned as a lien upon the real property when section 892 has been fully complied with. It follows from the views here expressed that the motion to quash the writ should be granted.

Motion granted.

WILLIAM GREEN, as Executor, Etc., of MARIA WILDBRET, Deceased, Plaintiff, *v.* SOPHIE SUTHERLAND and THE BOWERY SAVINGS BANK, Defendants.

(Supreme Court, New York Trial Term, May, 1903.)

Trust — Savings bank deposit — Intent of donor.

Where it was agreed between a savings bank and the two daughters of an aged depositor, confined to her bed for many months by an accident and needing some of her deposit and not a party to the conversation, that her account should be changed on the books of the bank so as to run "in trust" for one of the daughters and this was done, the court held, in an action brought by the executor of the depositor against the bank and that daughter, that her mother had no intention of creating a beneficial interest for her in the money and that what was left of it belonged to the executor as such.

ACTION to have a certain account now existing with the Bowery Savings Bank, in the name of "Maria Wildbret in trust for Sophie Sutherland, daughter," declared the property of the plaintiff.

H. A. & C. E. Heydt (Herman A. Heydt, of counsel), for plaintiff.

Allan Lee Smidt, for defendants.

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BLANCHARD, J. This action is brought to have a certain account now existing with the Bowery Savings Bank in the name of "Maria Wildbret in trust for Sophie Sutherland, daughter," declared the property of the plaintiff, the executor of the estate of Maria Wildbret, said Maria Wildbret having died since the account was opened in its present form. The only evidence offered at the trial was that produced by the plaintiff. The defendant did not take the stand, nor was any evidence offered in contradiction of that which the plaintiff produced. It appears that Maria Wildbret, an old lady eighty-three years of age, met with an accident, which necessarily confined her to her bed for many months. She desired to draw some money from her account with the Bowery bank and that institution sent its representative to the house where Maria Wildbret was confined. It appears that a conversation occurred at that time between Mrs. Green and Mrs. Sutherland, two of the daughters of Mrs. Wildbret, and the representative of the bank, whereby it was arranged between them that the account which then stood in the name of Maria Wildbret should be changed to the form in which it now stands, as before stated. This conversation, it would seem, was not heard by Mrs. Wildbret. Mrs. Green, who secured the transfer and had the necessary paper signed to effect the change, says she told her mother that in case she (her mother) wanted more money, "Sophie (Mrs. Sutherland) could go and get it." I am satisfied from the evidence that there was no intention to establish any beneficial interest in the defendant in the fund in question. As stated in the opinion of Justice O'Brien in the case of Farleigh v. Cadman, 159 N. Y. 169, 173, which is cited by defendant in support of her position: "A gift, whether in the form of a trust, or otherwise, always involves the intention of the donor," and so here I conclude that there was no valid gift to the defendant. It follows that there should be judgment for the plaintiff.

Judgment for plaintiff.

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Matter of the Application of MENDEL SINGER for the Examination of one CHARLES B. WOLFFRAM.

(Supreme Court, New York Special Term, May, 1903.)

Examination before suit — Refused in First Department where its purpose is merely to discover some one to sue.

In the First Department an examination before suit should not be granted to enable a person, who alleges that he has been injured by a libel printed in a newspaper, to ascertain from one, said to be in control of it, who its proprietor is, and this although it appears that in two actions of libel already brought by the applicant, after research and inquiry, against the witness and a corporation whom the applicant deemed editors or proprietors of the newspaper, answers were served by them denying that they were such.

Such an examination will not be granted in the First Department unless the applicant's moving affidavit names definitely the proposed defendant and shows a cause of action against him and in favor of the applicant.

APPLICATION to vacate an order for the examination of a witness before beginning suit.

Benno Loewy, for motion.

Durack & Brand, opposed.

GIEGERICH, J. An order having been heretofore obtained *ex parte* for the examination of one Charles B. Wolffram "concerning the ownership and control of a newspaper known as the 'New Yorker Herold, Abend Zeitung,' published in the city of New York," an application is now made to vacate such order on the ground of the insufficiency of the papers on which it was granted. The moving affidavits allege that, on the 13th day of November, 1901, there appeared a libelous article in the "New Yorker Herold, Abend Zeitung," charging the applicant with arson. It further appears from the moving affidavits that attempts have been made to ascertain who were the owners of the offending

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newspaper at the date of the publication, or at the present time. Also, that an action has been commenced against said Charles B. Wolffram and one William Mayer, who appeared on hearsay information to control the newspaper, but that the answer of those defendants denied that such was the fact. That subsequently an amended complaint, alleging that Wolffram was the editor of the paper, was served, which allegation was also denied. It is further alleged that continued inquiry of various mercantile agencies, and search of the records of the county clerk's office, disclosed the fact that there was a corporation known as "The New Yorker Zeitung Publishing and Printing Company," of which it was reported that the said Wolffram and Mayer were the principal officers, and that suit was accordingly instituted against said company for the alleged libel, service being made on Wolffram as an officer of the corporation. The answer to this complaint, however, also denied that the corporation was the owner, publisher or proprietor of the newspaper. It is also stated that upon the argument of a motion heretofore made in one of the two actions already commenced, the attorney who appeared for the defendants in both those actions, and who also appears to oppose this motion, stated in open court that the plaintiff had not as yet sued the proper party in either of said actions; and that subsequently, when application was made to this attorney for information as to who was the owner of the offending paper on the date of publication, such information was emphatically refused. Other efforts to discover who owned or controlled the newspaper at the time of the alleged libel are also averred. Upon the facts shown, there seems to be no question that, under the authority of Matter of Weil, 25 App. Div. 173, such an examination would be allowed. The rule in this department seems to be different, however, and to forbid the granting of such orders under such circumstances. In Matter of Anthony & Co., 42 App. Div. 66, an application was made to enable the applicant to frame its complaint in an action which it proposed to bring against whichever of the two companies the facts elicited on the examination should indicate was liable, and the court said: "We quite agree with the manufacturing company appellant that the proposed defendant must be definitely, and not tentatively, named in the affidavit (Code Civ. Pro., § 872), and that it must also be made to appear that the applicant has a cause of action against such specific person. De Leon v. De Lima, 66

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How. Pr. 287; Muller v. Levy, 52 Hun, 123." So, also, in Matter of White, 44 App. Div. 119, the application was to discover who was in possession of the premises in front of which the applicant was injured at the time of the alleged injury, in order that he might know against whom to bring his action, and the court said: "The order should consequently have been vacated: First, because the applicant's purpose is not, as it was in Merchants' National Bank v. Sheehan, (101 N. Y. 176), to examine a person against whom an action is about to be brought, but to examine a witness to ascertain whether he has a cause of action against a particular person, and, if he finds he has, to frame his complaint advisedly against such person. That, as we held in Matter of Anthony (42 App. Div. 66) is not authorized by sections 871 to 876 of the Code of Civil Procedure. Second, because, as was said in the case last cited, 'the proposed defendant must be definitely, and not tentatively, named in the affidavit (Code Civ. Pro., § 872); and that it must also be made to appear that the applicant has a cause of action against such specific person.'" Still later, in Matter of Schoeller, 74 App. Div. 347, the question was again presented to this department, and the same rule was adhered to, though this time by a divided court, the application being again made to discover who was the proper party to be made defendant in an action proposed to be brought to recover damages for personal injuries; or more specifically, to discover who was the owner of the express wagon which had caused the injuries, the court saying in the prevailing opinion (p. 348): "The purpose of the examination is apparent. It is to ascertain whether the plaintiff has a cause of action against the Metropolitan Company or against the transportation company, and the rule is well settled that an examination of this character cannot be had for the purpose of ascertaining whether or not the plaintiff in a proposed action has a cause of action. (Matter of Anthony & Co., 42 App. Div. 66; Matter of White, 44 id. 119; Long Island Bottlers v. Bottling Brewers, 65 id. 429.) This is precisely what was held in each of the cases cited, and in Matter of Anthony & Co. it was also held that a 'proposed defendant must be definitely and not tentatively named in the affidavit (Code Civ. Pro., § 872); and that it must also be made to appear that the applicant has a cause of action against such specific person.'" It seems plain, therefore, that the authority of the Weil case, which the applicant relies upon, is not

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recognized in this department, but that the rule here is the contrary, and that the motion to vacate should be granted. It might be further remarked that the order is obviously too broad because of its failure to limit the inquiry to the question of ownership and control at the date of the alleged libel.

Motion granted, with ten dollars costs.

HOWARD CALDWELL and WARREN E. OWENS, Plaintiffs, *v.* J. WALTER LABAREE and JAMES C. PEABODY, Defendants.

(Supreme Court, New York Special Term, May, 1903.)

Examination before trial — As to alleged fictitious sales of stock.

Where customers of stock brokers sue them to surcharge their accounts rendered, as containing items representing fictitious transactions, and the said accounts do not show who the buyers and sellers were and the moving papers of the customers allege that the information cannot be obtained except from the stock brokers, the customers are entitled to examine them before trial upon this material point as otherwise the customers could not refute any statement which the stock brokers might make on the trial in regard to the pretended purchases and sales.

MOTION to vacate an order for the examination of the defendants before trial.

Black, Olcott, Gruber & Bonynge (Abraham Gruber, of counsel), for motion.

Goldsborough, Villard & Warner (Henry W. Hardon and Harold G. Villard, of counsel), opposed.

GIEGERICH, J. The action is brought by customers against stock brokers to surcharge accounts rendered, it being alleged that certain items are false and fraudulent, and that the pretended transactions so set forth are fictitious. The accounts rendered fail to show the names of the buyers or sellers with whom the defendants claim to have had the alleged transactions, and it is stated

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in the moving papers that the plaintiffs have no means of learning who such pretended buyers and sellers were except by the examination of the defendants, and that such examination before trial is material and necessary. The motion to vacate the order is based upon the sole ground that it is not shown in the moving affidavits that it is necessary or important for the plaintiffs to have such examination before the trial, but that, on the contrary, for aught that appears, an examination at the trial will answer every purpose as well as would one in advance. In support of this contention Williams v. Folsom, 54 Hun, 308; Hay v. Zeiger, 50 App. Div. 462, and Jenkins v. Putnam, 106 N. Y. 272, are relied upon. In none of those cases does it appear that there was any necessity for obtaining the information desired prior to the trial. In fact, the difference between those cases and cases like the present was pointed out in one of those authorities (Williams v. Folsom), where it was said: "The cases of Miller v. Kent, 59 How. Pr. 321; Judah v. Lane, 12 N. Y. St. R. 131; Dyett v. Seymour, 19 id. 765, and Frothingham v. Broadway, etc., R. R., 9 Civ. Pro. 304, are entirely distinguishable from the application which was made for this order, for in each of them it was made to appear that a knowledge of facts, which could only be obtained by the examination of the opposite parties, was essential to enable the plaintiffs to proceed with the prosecution of the action. They were facts, too, of such a description as were required to be known before the trial itself, while here no necessity whatever exists or has been shown for obtaining the evidence of the defendants prior to the trial of the action;" and also, "it nowhere appears that the proper prosecution of the plaintiff's action will be in any manner dependent upon their ability to obtain the examination of the defendants before the trial itself shall actually take place." In the present instance this does appear. The issue is whether or not the alleged purchases and sales took place. The plaintiffs have no means, except by examination of the defendants, of discovering with whom the latter will claim these alleged transactions were had, and if this information is not afforded them until the day of the trial it is obvious that they cannot be in any position to refute any statement the defendants may see fit to make. It might further be observed that two of the cases distinguished in Williams v. Folsom, *supra*, viz., Judah v. Lane, and Dyett v. Seymour, were, like this, actions by customers against stock brokers for

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alleged false accounts of purchasers and sales, and in both the examination before trial was permitted. Talbot v. Doran & Wright Co., 16 Daly, 174, and Drake v. Weinman & Co., 12 Misc. Rep. 65, were also cases of the same character, where the same ruling was made. The motion should be denied, with ten dollars costs.

Motion denied, with ten dollars costs.

CHARLES L. FRANKLIN, Plaintiff, *v.* FRANK A. BURNHAM et al., Defendants.

(Supreme Court, New York Special Term, May, 1903.)

Injunction — To restrain Masons from trying a member — His pending criminal trial — His status.

A Mason indicted for libel cannot procure a continuance of an injunction restraining his fraternity from trying him, prior to his trial for libel, upon charges involving the same acts where there is no support for his allegations that the trial commissioners of the fraternity are biased and that he believes the Masonic charges and proposed trial are measures taken and intended by the fraternity to prejudice his criminal trial.

The injunction cannot be supported upon the ground that the Masonic proceedings may take from the plaintiff property without due process of law as a Mason has no severable right in the property of his fraternity so long as it is in existence, his existing rights being limited, providing he is a member in good standing, to using its property in the manner it prescribes.

MOTION to maintain an injunction *pendente lite*.

Baldwin & White, for plaintiff.

Truax & Crandall, for defendants.

GILDERSLEEVE, J. The plaintiff and the defendants are members of the Masonic fraternity. In accordance with Masonic rules, regulations and usages, the defendants Stewart, Phipps and

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Klingenstein were duly appointed by the defendant Crandall, who is the grand master of the Masons in the State of New York, trial commissioners to hear, try and determine certain charges preferred against the plaintiff. Two indictments against the plaintiff for criminal libel are now pending in this county, and it appears that one of the specifications in the above mentioned charges sets forth, substantially, the identical acts upon which the said indictments are based. I understand it to be the claim of the plaintiff that, practically, the said charges will raise the same issues of fact as the indictments. The plaintiff brings this action to enjoin the said commissioners from trying him on the said charges, upon the ground that his trial upon said indictments has not yet been had, and asserts that his trial by the said commissioners, at a time prior to his trial for criminal libel in the Court of General Sessions, in which said indictments were found, would cause him irreparable injury, for the reason that the commissioners appointed are biased and partial; that he would be forced to disclose the evidence upon which he relies to defend himself on the criminal trials; that before the commissioners he could not have the benefit of counsel of his choice; and that he would be deprived of property rights without due process of law. A preliminary injunction herein has been granted, which restrains the defendants from trying the plaintiff upon said charges, prior to his trial upon said indictments. This motion is to continue the preliminary injunction *pendente lite*. The principal ground set forth by counsel in support of the injunction is the claim that the Masonic proceedings are likely to take away the plaintiff's property rights without due process of law. The Masonic fraternity is a voluntary organization. It has a constitution and code of procedure designed for its government and for the regulation of its members in their relation to one another. A member of the Masonic fraternity has no right in the property of the organization, except that, while a member in good standing, he may enjoy the use of the same in a manner prescribed by said organization. His property right is nonenforceable and beyond the reach of execution. Kopp v. White, 99 N. Y. St. Repr. 1017. The rule laid down in White v. Brownell, 4 Abb. Pr. (N. S.) 191, relating to the New York Open Board of Brokers, seems applicable to the Masonic fraternity. The court said: "There may be property belonging to this body, derived from the payment of dues or fines,

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or consisting of the furniture of the room where the board meets; but the possession of it is a mere incident, and not the main purpose or object of the association. A member has no severable proprietary interest in it, or a right to any proportionable part of it upon withdrawing. He has merely the enjoyment and use of it while he is a member, but the property remains with and belongs to the body while it continues to exist, like a pew, the ultimate and dominant property in which is in the congregation and not in the pewholder; and when the body ceases to exist, those who may then be members become entitled to their proportionate share of its assets." It must be said from the foregoing that the plaintiff has no ground for apprehension from this source that can entitle him to injunctive relief. The other grounds urged are equally futile. All the material allegations of the complaint are denied by each of the defendants. The claims of plaintiff, that defendants are conspiring against him, and that he believes the Masonic charges were preferred and the trial thereof sought to be had for the purpose of affecting, to his prejudice, the trials of the criminal cases, are not supported by the proofs before me. So far as appears, the proceedings against him in the Masonic order are in strict accordance with the ordinary course of procedure by that body. It is the province of all courts constituting the civil judiciary to take cognizance only of those rights which flow from the common law, legislative enactments, political constitutions and international treaties. The right to membership in the Masonic fraternity springs from no one of those sources. Membership therein confers no legal right of which a court of equity will take cognizance. White v. Brownell, *supra*. The Masonic fraternity is an unincorporated society which has customs and laws of its own. The plaintiff voluntarily became a member thereof, and in so doing submitted himself to the customs and laws of the organization, and for any alleged infraction of those customs and laws by plaintiff it is his duty to stand trial in the forum constituted by the organization, and at the time and in the manner it prescribes. The motion to continue the injunction must be denied, and the preliminary injunction set aside. No costs. Settle order on notice.

Motion denied, preliminary injunction set aside. No costs.

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LOUIS BOSSERT et al., Plaintiffs, *v.* ADAM HAPPEL, Impleaded with HENRY E. FOX et al., Defendants.

(Supreme Court, New York Special Term, May, 1903.)

Mechanic's lien — Insufficient notice of lien.

A statement, in a notice of mechanic's lien, that "(4) The labor performed and the materials furnished and to be furnished consists of wainscoting, closets * * * and the agreed price and value thereof is $611.86 dollars 611.86 less amount allowed for material. (5) The amount unpaid to the lienor for such labor (or) (and) materials is $603.61 six hundred and three and 61-100 ($603.61) dollars. (6) The time when the first and last items of work were performed and materials furnished, is first delivery December 9, 1901, last delivery January 17, 1902, within ninety days last past", creates no lien under the Lien Law (L. 1897, ch. 418, § 9) as it cannot be determined therefrom whether the claim is for labor performed and materials furnished or for labor performed and materials to be furnished nor is there any item showing whether labor has been performed.

ACTION to foreclose a mechanic's lien.

Atwater & Cruikshank, for plaintiffs.

Phillips & Avery, for defendant Happel.

TRUAX, J. This is an action to foreclose a mechanic's lien filed by the plaintiffs in the office of the clerk of the county of New York on the 17th day of January, 1902, for the sum of $603.61. The lien of the plaintiffs is against Henry E. Fox as contractor and Bolton Hall as owner. On the 7th of April, 1902, the owner of the property, the defendant Thomas Berkely, was indebted to the contractor Henry E. Fox in the sum of at least $611.75, and on that day deposited with the clerk of the county of New York that amount in order to obtain a discharge of the lien. Said defendant has stipulated that that amount so deposited was taken out of the fund due from him to the defendant Fox. After the filing of the notice of lien by plaintiffs, the defendant Happel filed a notice of lien on the 21st day of March, 1902, for the sum of $616.68. The only controversy in this case is between the

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plaintiffs and the defendant Happel, the other defendants having defaulted on the trial, and is one of law, and depends upon the sufficiency of the form and contents of the plaintiffs' lien. The defendant Happel contends that the notice of mechanic's lien filed by the plaintiffs was wholly insufficient upon the face thereof to charge a lien in the plaintiffs' favor upon the real estate against which the same purported to be filed. The notice of lien filed by the plaintiffs did not comply with section 9 of the Mechanics' Lien Law of the State of New York, chapter 418 of the Laws of 1897, and the filing thereof did not create a lien. Bradley & Currier Co. v. Pacheteau, 71 App. Div. 148. In that case the notice of mechanic's lien was almost the same as the notice of the plaintiffs in this action. The court in commenting upon the form of mechanic's lien in that case said: "The statute (Laws of 1897, chap. 418, § 9) provides that the notice filed shall state the name and residence of the lienor; the name of the owner of the real property against whose interest a lien is claimed; the name of the person by whom the lienor was employed, or to whom he furnished or is about to furnish, materials; or, if the lienor is a contractor or sub-contractor, the person with whom the contract was made; the labor performed or to be performed, or the materials furnished or to be furnished, and the agreed price or value thereof, and the amount unpaid to the lienor for such labor or materials. In addition to this the notice must be verified by the lienor or his agent to the effect that the statements therein contained are true to his knowledge, except as to the matters therein stated to be on information and belief, and as to those matters that he believes them to be true. The notice here filed did not comply with the statute, and construing it liberally, as we are required to do by section 22 of the same act, it is unintelligible, and no one can determine from it the ground upon which the lien is claimed, whether for materials furnished or to be furnished, for labor performed or to be performed, and in other respects it is just as indefinite and defective. The statement in the notice is: '(3) The name of the person by whom the lienor was employed, or to whom he furnished, or is to furnish, materials is J. Pacheteau, and the person with whom the contract was made is J. Pacheteau. (4) The labor performed or to be performed is mantels and fixtures, and the materials furnished or to be furnished, and the agreed price or value thereof is four hundred and seventy-five ($475). (5) The amount unpaid to the

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lienor for such labor (or) (and) materials is four hundred and seventy-five dollars ($475). (6) The time when the first items of work were performed (or) (and) materials were furnished was October 5th, and the time when the last items of work were performed (or) (and) materials were furnished was October 18th.' It does not require argument to demonstrate that this notice does not comply with the statute and it cannot be construed in such a way as to enable the plaintiff to derive any benefit from it. The liberal construction provided for in the statute assumes that the statute has, at least in form, been complied with, and that was not done here. To give this notice any other construction would in effect be holding that a lien might be acquired by the filing of a notice, no matter how defective, and irrespective of whether or not it complied with the statute at all." The plaintiffs' notice of lien does not comply with the statute, and "it is unintelligible, and no one can determine from it the ground upon which the lien is claimed, whether for materials furnished or to be furnished, for labor performed or to be performed, and in other respects it is just as indefinite and defective." The statement in the notice here is "(3) The name of the person by whom the lienors were employed and to whom they furnished materials is Henry E. Fox and the person with whom the contract was made is Henry E. Fox. (4) The labor performed and the materials furnished and to be furnished consists of wainscoting, closets, wardrobes, dressers, doors, jambs, sashes, frames, headlights, panels, backs, base trim and mouldings, columns and pedestals, mantel shelves and steps, and the agreed price and value thereof is $611.86 dollars 611.86 less amount allowed for material. (5) The amount unpaid to the lienor for such labor (or) (and) materials is $603.61 six hundred and three and 61-100 ($603.61) dollars. (6) The time when the first and last items of work were performed and materials furnished, is first delivery December 9, 1901, last delivery January 17, 1902, within ninety days last past." It is absolutely impossible to determine upon reading the above lien whether the lien is claimed for labor performed and materials furnished or for labor performed and materials to be furnished. The statement in paragraph 4 of the lien is to the effect that it is claimed for labor performed and materials furnished and to be furnished, and then it proceeds to describe what the materials were, but there is no item set forth showing whether any labor whatsoever had been per-

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formed. No person upon examining this lien upon the files in the county clerk's office could determine for what amount a lien was claimed against the real property, as there is nothing to show what had actually been furnished by the plaintiffs. The provisions of section 9 of chapter 418 of the Laws of 1897, which is the present Mechanics' Lien Law of the State of New York, requires that a notice of mechanic's lien shall state "(4) The labor performed or to be performed, or materials furnished or to be furnished and the agreed price or value thereof." This clause takes the place of the provision in section 4 of chapter 342 of the Laws of 1885, which was the previous Mechanics' Lien Law of the State of New York, and among the provisions of that section stating the necessary contents of a notice of lien is the following: "The name of the person or persons, firm or firms, corporation or association by whom he was employed or to whom he furnished or is about to furnish such materials, or whether all the work for which the claim is made has been actually performed or furnished, and, if not, how much of it, and also a description of the property to be charged with a lien," etc. The Legislature in framing the Lien Law of 1897 evidently intended that clause 4 of section 9, which has been quoted above, should take the place of the above quoted provision of the Laws of 1885, and that a notice of lien should state the same particulars in that respect, and the language used is merely a shorter form of expressing the necessary statements to be made in a lien. It was held in numerous decisions under the act of 1885 that the omission to state whether all the work had actually been performed or all the material had actually been furnished was a fatal defect, and that a notice which did not show such facts was not a substantial compliance of the requirements of the statute. Luscher v. Morris, 18 Abb. N. C. 67; Close v. Clark, 16 Daly, 91, 9 N. Y. Supp. 538; also Cumming & Gilbert's Annotated Lien Law (2d ed.), 76, 77. The defendant owner having stipulated that the amount deposited by him to discharge the plaintiffs' alleged lien was a part of the fund due from him to the contractor, the defendant Fox, the defendant Happel has thus proved that there was due, owing and unpaid from the owner to the contractor under whom he claims, at the time of the filing of his notice of lien or that subsequently there became due, owing and unpaid, at least the sum of $611.75, and judgment should be awarded directing the dismissal of the complaint, and that the real property described in the defendant Happel's answer be sold

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in the usual manner and the proceeds brought into court to pay the expenses of the sale and the amount of his lien and the costs of the action. The defendant Berkely has stipulated that the amount deposited by him with the county clerk to discharge the plaintiffs' lien, namely, the sum of $611.75, was taken by him from the fund due from him to the defendant Fox, and deposited on the 7th day of April, 1902. All of the defendants, except the defendant Happel, having defaulted upon the trial, there can be no question that the right to this fund is either in plaintiffs or the defendant Happel. The plaintiffs' alleged lien having been discharged by this deposit, their lien, if any, attaches to the fund, and their lien being invalid because of its insufficiency upon the face thereof, judgment is ordered directing a dismissal of the complaint and for the defendant Happel as above stated.

Complaint dismissed.

DORA S. HOLBROOK BROWN et al., Plaintiffs, *v.* ANN ELIZA FISH et al., Defendants.

(Supreme Court, Suffolk Special Term, May, 1903.)

Practice — Leave to withdraw answer and answer over.

Where one of the defendants in an action of ejectment, after succeeding on a motion to strike from the complaint as irrelevant certain allegations giving a history of the title and of claims and disputes existing in regard to the land for many years between various persons, answers the complaint as it stood after the striking out, and thereafter the decision of the Special Term is reversed on appeal and the matter stricken out reinstated upon the ground that codefendants of the moving defendant had not been made parties to the motion and that as against them the matter stricken out was essential, the moving defendant should be allowed to withdraw her answer and be given a reasonable time to answer the complaint as reinstated and also to require the plaintiffs, who had the information but refused to furnish it, to furnish her with information concerning her codefendants so that she may bring them into court and have it determined whether they may not properly be stricken out as defendants, having no interest in the land.

MOTION by defendant Fish for leave to withdraw her answer and to have a reasonable allowance of time within which to answer

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or demur, or make any motion herein, and also to require plaintiffs to furnish defendants certain information concerning her co-defendants.

Joseph Fischer, for plaintiffs.

Herbert L. Fordham, for defendant Fish.

SMITH, W. M., J. This is a motion made by the defendant Fish for leave to withdraw her answer and to have a reasonable allowance of time within which to answer or demur or make any motion herein, and also to require the plaintiffs to furnish to the said defendant certain information concerning her codefendants.

In order to understand the significance of the motion, it is necessary to consider briefly the history of the action which is set forth in the moving papers. The action is in ejectment. The complaint is not in the usual form, but contains many allegations concerning the history of the title. The defendant Fish made a motion about a year ago to strike out portions of the complaint as irrelevant and redundant. This motion was granted by Mr. Justice Gaynor (37 Misc. Rep. 367). From the order entered thereon an appeal was taken by the plaintiffs, and in November last the Appellate Division reversed the said order (77 App. Div. 644) on the ground that the codefendants of the defendant Fish had not been made parties to the motion and on the additional ground that, according to the contention of the plaintiffs, the allegations stricken out were essential as against the said codefendants. Thereafter, as appears by the moving papers, the defendant Fish requested the plaintiffs to furnish such information concerning her codefendants as would enable her to bring the said codefendants into court, in order that it might be determined what rights, if any, they had in the action and whether they could not properly be stricken out; in which latter event, according to the opinions handed down at Special Term and by the Appellate Division, the defendant Fish would be entitled to the relief originally granted. This information was not furnished, although it is not denied that the plaintiffs who made these codefendants parties to the action are in possession of this information. In fact, the only argument advanced by the plaintiffs in opposition to this branch of the motion was that these codefendants had no rights in the action in any

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event. While this statement may be true, it is in direct opposition to the position taken by the plaintiffs before the Appellate Division, and consequently does not commend itself to the favorable consideration of the court as a reason for denying this motion. The information desired appears to be essential to the defendant Fish. The court has the power to order the information to be given, and I deem this an appropriate occasion for the exercise of this power.

Leave to the defendant Fish to withdraw her answer is obviously proper. The answer was served after the decision at Special Term, and appears to have been sufficient as the complaint then stood. Subsequently the Appellate Division reinstated certain portions of the complaint. The result is that the portions of the complaint that have been reinstated are admitted by the original answer. There appears to be no reason why the defendant Fish should not be permitted to take such action as she may be advised concerning the complaint as it now stands.

The motion is addressed to the discretion of the court. The relief demanded is proper and the motion is granted.

Motion granted.

Matter of the Guardianship of ALFRED and CHARLES JACQUET.

(Surrogate's Court, Monroe County, May, 1903.)

Guardian of the person — Notice to father — Refusal to appoint him — Religious training of infants.

Where, upon petition and without notice to the father of the infants, their aunt was appointed guardian of their persons, the surrogate vacated the order because the father had not had notice although entitled to it.

The surrogate appointed the grandmother temporary guardian and would not appoint the father because he had been guilty of petit larceny and intoxication, nor the mother because she had become an incompetent.

The surrogate held that the children must be brought up as Catholics, the religion of their father and also of their mother, although when the aunt was appointed guardian the children were in a Protestant institution by consent of the mother.

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PETITION by father to revoke letters of guardianship issued to Clara Lerch, an aunt, in each of above cases.

Eugene J. Dwyer, for petitioners.

Francis S. Macomber, for guardian.

BENTON, S. Mrs. Clara Lerch, aunt to the infants above named, was appointed guardian of the person of each of them on the 29th day of May, 1902. The infants' mother was then an inmate of the Rochester State Hospital. The petition stated that the father had deserted said infants and his whereabouts or whether he was alive or dead were unknown to the petitioner. At that time, however, he was in fact a resident of this city, and was, therefore, entitled to notice of the application for the appointment of a guardian of his children, although at that time the family was broken up and he was not supporting his wife or children. Thereafter, and in June following, he commenced proceedings in this court to revoke the former letters, and prayed for his own appointment as guardian of his said children.

The absolute power of the court to appoint a guardian other than either parent cannot be disputed. The welfare of the child is the primary consideration. The law would develop good character, giving the community a useful member, the State and nation a dutiful citizen. There are, nevertheless, certain considerations in the exercise of this power which cannot be and should not be ignored. In the absence of statutory regulations and manifest unfitness, the father, as between himself and his wife, is entitled to the custody of his infant children. His right is paramount and will be enforced, nor can he at common law alienate that right, not even by articles of separation with his wife.

People v. Mercein, 3 Hill, 399: "The father is the natural guardian of his infant children, and in the absence of good and sufficient reasons shown to the court, such as ill usage, grossly immoral principles or habits, want of ability, etc., is entitled to their care, custody and education. All the authorities concur in this point."

People ex rel. Nickerson v. ————, 19 Wend. 16: "The interference of the court with the relation of father and child, etc., is a delicate and strong measure; and the power should never be exerted except for the most sound and solid reasons."

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That such reasons may and do exist in certain cases is not and cannot be denied. If it clearly appears to the court that the child's welfare will be promoted by taking its custody from either the father or mother, or from both, and giving it to a stranger, it becomes the duty of the court so to do.

By statute in this State "A married woman is a joint guardian of her children with her husband, with equal powers, rights and duties in regard to them." 3 Heydecker Gen. Laws (2d ed.), 3957.

Another question has been raised by the parties to this litigation, and by the prominence they have given it in the pleadings and upon the trial and argument, it has become the most important question involved, and that is the religious training of these children. Liberty of conscience is a fundamental right of American citizenship. Most of us believe with Jefferson that religion is a matter which lies solely between man and his God, and that he owes accountability to none other for his faith and worship.

It is said in Watson v. Jones, 13 Wall. (U. S.) 679, 728, that: "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

But these principles and rights appertain in full only to those who have reached majority or mature judgment. During the period of immaturity incident to infancy the father and mother are the natural guardians of their children. They must shield them from dangers and temptations that beset not only their physical and moral, but also their spiritual, welfare. It is for them to lead in the path of a religion of their own choosing. If they agree, no question can arise, but here a case of disagreement is claimed. Both parties were Catholics, they were married in the Catholic faith. The ancestry of the children, so far as shown, is Roman Catholic. So far as the father makes religious profession he is a Catholic, but it must be found upon the evidence that his practice has not conformed to the profession of any religious creed. He has been convicted of petit larceny and of intoxication. He was committed to the State Industrial School, and has been an inmate of the penitentiary under convictions, yet he produces evi-

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dence of his associates, if not employers, as to his efficiency as an employee, which is to his credit. His mother says of his habits, "He was always temperate, and it is very seldom he breaks out." He expresses his urgent desire that his children be reared in the Catholic faith, and that is also the wish of his mother.

Of late, prior to her loss of mind, the mother of the children, to Protestants declared herself to be a Protestant and expressed the wish that the children be educated in the Protestant faith. It is also in evidence that to Father Sinclair she expressed a very earnest hope that the children would be brought up in the Catholic faith. The authorities in whose care the children were at and prior to the appointment of Mrs. Lerch were informed by the mother of the children that she was a Protestant, and in good faith acted upon that information.

Upon the evidence given, and it has taken a wide range and involved persons other than the actual parties to this transaction, this court must now decide as to whether its power shall be used for the rearing of the children under Catholic or Protestant influences.

In England the question of religious preferences as between father and mother has been decided very forcefully in favor of the father. In Matter of Scanlan, L. R., 40 Ch. Div. 200, 213, the court cites an authority with approval, holding the guardian was to have sacred regard to the religion of the father in dealing with the child, and unless under very special circumstances, to see that the child is brought up in the religious faith of the father, whatever that religion may have been. It seems to me to have been squarely held there that the father has the absolute right in his lifetime to decide what religious education the child shall receive, and after his death the guardians are to follow out his wish.

In Matter of De Marcellin, 4 Redf. 299, and affd. in 24 Hun, 207, it is said: "All authorities agree that the expressed wish of the parents of a child, and particularly of the father, should have great weight with the court in the appointment of a guardian." The question of religion seems to have been involved in that case.

While the ancient doctrine of *patria potestas* is only now an historical fact, and the common-law merger of the existence of the wife into that of her husband has ceased, while the wife is now in most respects the legal equal of her husband, yet the headship of the husband in the family is something more than mere senti-

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ment. It is his name which is perpetuated, and his character should shape the conduct, and his ability achieve the success, of the household. In the nature of things it must still remain true that the father, though not in a tyrannical or opprobrious way, should be the head of the family.

The cases in the books are not numerous. Fortunately, questions of religious faith are but seldom subjects of legal issues. It has been made basic in this proceeding. Upon the preponderance of the evidence as presented here, principle and authority impel this court to commit these children to Catholic guardianship until maturity shall give to each that absolute freedom of choice of a religious belief that his judgment and conscience approve, which is the birthright of his American citizenship.

The suggestions urged by counsel in favor of the appointment of the grandmother, Mrs. Catharine Harvey, meet my approval. I think under all the circumstances of these cases it is preferable to award her the temporary guardianship.

The letters of Mrs. Lerch are in each case revoked. Letters of temporary guardianship of the person and property may be granted Mrs. Catharine Harvey, on her filing a bond in the penalty of $200 in each case and taking the oath of office, subject to further application upon settling the decree. Findings may be drawn and decrees settled and entered on appearance in open court or on two days' notice by either counsel to the other. The stenographer's fee of twenty-two dollars and twenty-five cents is hereby allowed as a disbursement of this proceeding.

Letters in each case revoked.

Matter of the Transfer Tax upon The Estate of JOHN GARLAND, Deceased.

(Surrogate's Court, Monroe County, May, 1903.)

Transfer tax.

A testator left personalty, worth $500, and a farm, worth $6,200, to his widow and children but gave an uncle a life use, in the farm, worth $337.

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Held, that the life use of the uncle was not taxable because the property passing to the widow and children was specifically exempt from the transfer tax and, therefore, property of the testator of the value of $500 had not been transferred to any person.

MOTION by the comptroller to assess the transfer tax in within estate.

William T. Plum, for State comptroller.

Wellington, Jones & Millard, for executor.

BENTON, S. The personal effects of the deceased, worth about $500, were given to his widow and children. Also his farm, appraised at $6,200. There was also given a life use to James T. Garland, an uncle, which the superintendent of insurance has found to be of the present value of $337. It is claimed that this is taxable, and the surrogate is asked to impose a tax of $16.85, besides the penalty accrued thereon.

The property passing to the widow and children is concededly exempt from this tax, but a tax by the act is imposed upon the transfer of any property, real or personal, of the value of $500 or over, to certain persons, including this uncle. If the word "property" is to be defined to mean the whole estate, as more than $500 passed this life use would be taxable, but section 242 of the act defines the word "property" and says: "It shall be taken to mean the property or interest therein of the testator, etc., passing or transferred to those not herein specifically exempted from the provisions of this article." As the property passing to the widow and children is specifically exempted it is not included, and hence there is not property of the value of $500, as the word is defined in the Tax Law, passing to any person. Hence, there can be no tax imposed. This is in line with the surrogate's decision in Matter of Conklin, 39 Misc. Rep. 771. Matter of Corbett, 171 N. Y. 516, is cited on the part of the State as authorizing this taxation, and it seems to have been followed in a recent case in Surrogate's Court. A careful reading of Matter of Corbett will not sustain the contention of the State, for the court says: "An estate of $15,000, in which $6,000 was given to a bishop or religious cor-

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poration, which are specifically exempted from taxation by the statute, and $9,000 given to a brother and sister, would not be taxable because the aggregate amount passing the persons not specifically exempted would not be of the value of $10,000." The plain reading of the Transfer Tax Law compels the denial of the prayer of the State that a tax be imposed in this case. So ordered.

Motion denied.

Matter of the Estate of JAMES S. GIBBES, Deceased.

(Surrogate's Court, New York County, May, 1903.)

Transfer tax — Foreign bonds of a foreign testator which were here when he died and remained here as corpus of a trust he created.

Foreign bonds, which a nonresident testator had in the State of New York when he died and which thereafter were kept here as *corpus* of a testamentary trust he created for the lives of his son and grandson, are taxable, when passing under his will and after their deaths to his collateral relatives, according to the transfer tax law in force when he died — in this case, L. 1885, ch. 483, as amd. by L. 1887, ch. 713.

APPEAL from an order assessing and fixing the transfer tax.

Turner, Rolston & Horan, for trustee.

Guthrie, Cravath & Henderson, for Chas. H. Swanton and others.

THOMAS, S. This decedent was a resident of Charleston, S. C., and died there April 26, 1888. At the time of his death and for some time prior thereto there were within this State bonds of foreign corporations belonging to him which still remain here. Under the provisions of his will and the codicils thereto these bonds have been held in trust during the lives of his son and his grandson. The will bequeaths them to certain collateral relatives and to the city of Charleston, S. C., in the event of the death

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of the testator's son and grandson without issue, and this contingency having happened, the bonds are now to be turned over to the legatees. The order made upon the report of the appraiser imposes a tax on the transfers, and appeals have been taken from that order.

The question of taxability is governed by the law in force at the time of the decedent's death, notwithstanding that the legacies were contingent upon the death of the decedent's son and grandson without issue. Matter of Vanderbilt, 172 N. Y. 69, 73. That law was chapter 483 of the Laws of 1885, as amended by chapter 713 of the Laws of 1887. Under it the transfer of bonds of corporations kept by a non-resident decedent in this State was held by the Court of Appeals to be taxable. Matter of Romaine, 127 N. Y. 80. It does not appear in the report of the case, nor in the papers on file in this court in the tax proceeding, whether the bonds were those of domestic or of foreign corporations. The reasoning of the court, however, is equally applicable to either kind, the principle underlying the case being that the physical presence of the bonds within the State rendered their transfer taxable, and that they were to be regarded as in the nature of chattels. This principle was expressly approved in Matter of Whiting, 150 N. Y. 27, 29, where a transfer of bonds of foreign corporations, kept in this State by a non-resident decedent, was held to be taxable under chapter 399 of the Laws of 1892.

On the authority of these cases the transfers under consideration must be held taxable. The contention of one of the appellants that the decision in the Whiting case, *supra,* was reached only by force of the Statutory Construction Law, Laws of 1892, chap. 677, and is therefore not applicable to the case at bar is untenable.

I regard the constitutional questions urged by the appellants as settled in favor of the State by the recent decision of the Supreme Court of the United States in Blackstone v. Miller, N. Y. L. J., Feb. 2, 1903.

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Matter of the Petition of PATRICK W. CULLINAN, as State Commissioner of Excise, for an Order Revoking and Cancelling Liquor Tax Certificate No. 13,215, issued to ANTONIA BABSKI.

(Supreme Court, Erie Special Term, May, 1903.)

Liquor Tax Law — Procedure for revocation.

The unconstitutionality of the amendment made in 1900 (ch. 367, § 9) to subdivision 2 of section 28 of the Liquor Tax Law, requiring the holder of a liquor tax certificate when brought into court for alleged violations, to file a verified answer tendering an issue or suffer revocation of his certificate, does not nullify the whole scheme of revocation provided by said subdivision 2 but leaves unimpaired the procedure as established by that subdivision in its original form.

The court held an answer unnecessary but ordered a reference to take proofs and report.

APPLICATION to revoke a liquor tax certificate.

William G. Van Loon, for petitioner.

Eugene L. Falk, for respondent.

KENEFICK, J. This application is based on a verified petition alleging upon information and belief certain violations of the Liquor Tax Law, and upon an affidavit containing positive averments of such violations.

Upon the return day of the order to show cause issued thereon, the certificate holder appeared by attorney and interposed the objection that the provision of subdivision 2, section 28, of the Liquor Tax Law, requiring him to file a verified answer tendering an issue and in default of such answer directing the revocation of his certificate, is unconstitutional and, therefore, void for the reason that he cannot be compelled to answer under oath in a proceeding to forfeit his property.

In view of the recent decision of the Appellate Division in the Second Department (Matter of Cullinan, 81 N. Y. Supp. 567), this objection must be sustained.

Upon the authority of that case the respondent claims that the

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unconstitutional provision above referred to renders entirely nugatory and ineffectual the whole scheme provided by subdivision 2 of section 28 for the revocation of liquor tax certificates and that this proceeding must fail.

It can hardly be claimed that the decision in the case cited goes so far. There the respondent appeared but refused to serve an answer, raising the constitutional objection urged here, and the Special Term made a summary order revoking the certificate. The Appellate Division decided simply that the provision for a verified answer was unconstitutional, and that the Special Term was not authorized upon the mere assertion of facts in the form of an affidavit, to revoke the certificate.

Is the sweeping claim made by the respondent's counsel in this case the logical and necessary result of that decision?

The law, as originally enacted (Laws of 1896, chap. 112, § 28, subd. 2), contained no requirement that the respondent should file an answer to the petition for revocation. He was brought into court upon the order to show cause, and thereupon "The justice before whom the same is returnable shall hear the proofs of the parties, and may, if deemed necessary or proper, take testimony in relation to the allegations of the petition, or appoint a referee to take proofs in relation thereto, and report the evidence to such justice or court. If the justice or court is satisfied that material statements in the application of the holder of such certificate were false, or that the holder of such certificate is not entitled to hold such certificate, an order shall be granted revoking and cancelling such certificate."

Chapter 367, Laws of 1900, amended this subdivision so as to require the respondent to file a verified answer to the petition tendering an issue as to the violations alleged and in default of such answer directing the court to make a summary order revoking the certificate. If such an answer were filed, then the proofs were to be taken before the court or a referee as provided in the original enactment.

The amendment of 1900 is condemned by the decision, In re Cullinan, referred to above; but can it be said that the whole subsection is thereby nullified?

The general rule of statutory construction is that: "When part only of a statute or a section is unconstitutional, that part only is void, unless the other provisions are so dependent and connected

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with that which is void, that it cannot be presumed that the legislature would have enacted the one without the other." Duryee v. Mayor, 96 N. Y. 492.

The presumption is hardly permissible, in view of the character and history of this legislation, that the law-making power would not have retained the method provided in the original statute for revocation of a certificate without the provision condemned as unconstitutional. They are not so interwoven that they must stand or fall together. The amendment of 1900 was essentially the addition of a more summary method of revocation to the procedure then existing.

Judicial disapproval of the addition leaves unimpaired the original procedure for revocation.

The conclusion is thus reached that the respondent is not required to file an answer to the petition and that a reference should be ordered to take proofs in relation to the allegations of the petition and to report the evidence to the court.

Ordered accordingly.

GEORGE W. SAUER, Plaintiff, *v.* THE CITY OF NEW YORK, Defendant.

(Supreme Court, New York Special Term, May, 1903.)

Municipal corporation — Viaduct erected by statute for a "street use" — Consequential damages to easements not recoverable by abutting owner.

Where a municipal corporation acting under and in accordance with a statute erects, upon and over a street of which it owns the fee, a viaduct for the public benefit and to carry the street at a higher level, the viaduct is lawful as an erection for a "street use" and the Legislature has power to authorize it without providing compensation to property owners affected thereby.

An abutting owner who has thereby suffered consequential damages to his easements of light, air and access can recover no damages of the city as he must bear his loss as an incident to the welfare of the community.

ACTION for injunction, alternative upon the payment of future damages, and for past damages claimed to have been sustained

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by the plaintiff through the erection of a viaduct upon and over One Hundred and Fifty-fifth street adjacent to plaintiff's premises. Submitted upon agreed facts.

Abraham I. Elkus, for plaintiff.

George L. Rives, Corporation Counsel (Edward J. McGuire, of counsel), for defendant.

BISCHOFF, J. The fact that the viaduct, as to the maintenance of which the plaintiff complains, was constructed in accordance with the statute authorizing this particular work is admitted, as is also the fact that the defendant owns the fee of the street, and the question which the record presents is whether this abutting owner has suffered a legal injury through a partial deprivation of the enjoyment of easements of light, air and access by reason of the presence of an elevated structure erected over the street for the passage of wagons and pedestrians, in accordance with legislative authority, to facilitate public travel upon the highway.

That a property owner who suffers a consequential injury through the work of improvement in a public street, conducted under lawful authority, must bear his loss as an incident to the welfare of the community, was early declared (Radcliff's Exrs. v. Mayor, 4 N. Y. 195) and lately reaffirmed. Fries v. New York & Harlem R. R. Co., 169 id. 270. The theory upon which compensation is awarded to owners of property abutting upon the line of the elevated railway, for a taking of their easements, has its foundation in the pronouncement of the courts that the railway's use of the street was not a "street use," a term used to define a judicial limitation upon the general power of the State to devote the highways to uses for the best interests of the public. The abutting owner cannot object if his street easements are taken for a public purpose because such property rights as he may have, in this aspect, are subject to the superior rights of the public and it is only where, as in the case of the elevated railroad, the public use is not a "street use," that a property right is infringed by the taking of the easements.

As to public uses of the street, generally, the rule has been stated to be that "When no private interests are involved or invaded the legislature may close a highway and relinquish altogether its use by the public, or it may regulate such use or restrict

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it to peculiar vehicles or to the use of particular motive power. It may change one kind of public use into another, so long as the property continues to be devoted to public use. What belongs to the public may be controlled and disposed of in any way which the public agents see fit. * * * As long as the use to which a highway or any other public property or right is to be applied or transferred is a public use, it is a matter of discretion in the legislature to permit its application or transfer, and the people must question their action elsewhere than in the courts." People v. Kerr, 27 N. Y. 188–192.

That a public improvement in the street, in the nature of a change of grade, does not invade private interests, notwithstanding its effect upon the value of the abutting owners' property in diminishing the enjoyment of their easements of light, air and access is the settled rule in this State (Radcliff's Exrs. v. Mayor, *supra*), and it is only where the public improvement is a "non-street use," as in the elevated railway cases, that the courts have found in the consequential loss of the easements a "taking" of property for which, under the Constitution, compensation must be made. Raising the level of a street by means of a viaduct for strictly street purposes results in no subjection of the street to a "non-street use," and the situation lacks the main element which made a recovery in the elevated railway cases possible. Demarest El. R. Law, 28–31.

That the doctrine of the elevated railway cases is not to be extended is apparent from the recent decisions of the Court of Appeals in relation to the claim for damages made by abutting owners whose easements had been interfered with through the erection of a viaduct for the use of a railway in Park avenue. Public necessity called for the raising of the grade of this railway (originally in the street and using a depressed cut) and the erection of a viaduct was held by the majority of the court to be within the rule which denies a recovery of damages for consequential injuries caused by the change of the grade of a street. Fries v. New York & Harlem R. R. Co., *supra*.

Furthermore, the elevated cases have been distinguished from the Park avenue cases upon the ground that the former did not involve an "attempt to improve the street for the benefit of the public" (Muhlker v. New York & Harlem R. R. Co., 173 N. Y. 549, Parker, Ch. J.), a distinction which can only serve to elimi-

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nate from the case before me the theory of property damage applied in the elevated railway cases and which serves as the sole support for the plaintiff's cause of action.

The Fries and Muhlker cases are directly inconsistent with the intimation of Sauer v. Mayor, 44 App. Div. 305, that the interference with the plaintiff's easements is a "taking" of property and that this viaduct is not a change of grade, within the rule of Radcliff's Exrs. v. Mayor, and I find no escape from the conclusion that these later cases have overruled this decision of the Appellate Division, upon which the plaintiff relies.

It cannot be doubted that this viaduct was constructed wholly for the benefit of the public, in affording a necessary means of access between the high level of St. Nicholas place and the westerly end of Macomb's Dam bridge. For the purpose of making a grade which would give this means of access, the city could have made a solid embankment upon the bed of One Hundred and Fifty-fifth street, and, within established rules, the plaintiff could not complain. The viaduct, by leaving the surface of the street as it was, accomplishes the public purposes involved with much less injury to abutters, and, failing the application of the rule which obtains in the elevated railway cases, there is no room for a logical argument which can place this case without the *damnum absque injuria* doctrine of Radcliff's Exrs. v. Mayor. See also Uline v. N. Y. C. & H. R. R. R. Co., 101 N. Y. 98.

That the erection of a viaduct to carry the street at a higher level, for the benefit of the public, is a "street use," within the principles of the change of grade cases and is not a "taking" of property under the elevated railway decisions, was held in Selden v. City of Jacksonville, 14 L. R. A. 370, in an opinion which contains an exhaustive review of the authorities and proceeds upon persuasive reasoning.

My conclusion is that the plaintiff's loss results from a situation common to all property owners who may be affected by a public improvement, and that he cannot hold the city liable, nor can he assail, as unconstitutional, the statute which provides for the improvement without compensation to him.

There should be judgment for the defendant, upon the merits, but without costs.

Judgment for defendant, without costs.

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THE PEOPLE ex rel. GEORGE A. GRESS, Relator, *v.* GEORGE HILLIARD, as Special Deputy Commissioner of Excise for the Boroughs of Manhattan and The Bronx, Respondent.

(Supreme Court, New York Special Term, May, 1903.)

Liquor Tax Law — Rate of tax in a part of the borough of The Bronx under L. 1903, ch. 115.

The provisions of subdivision 7 of section 11 of the Liquor Tax Law, as amended by L. 1903, ch. 115, § 1, declaring that "The excise taxes assessed under this act in cities containing a population of fifteen hundred thousand or more, which are or shall be formed by the consolidation of territory situate in one or more counties, shall be assessed in the several boroughs or portions of the territory so consolidated to form such city at an advance of one-half in the rate over the amount at which such taxes were assessed on the thirty-first day of December, nineteen hundred and two, in the several portions of the territory so consolidated" govern the future rate of said tax in that part of the borough of The Bronx which was originally annexed to the city and county of New York as a part of the first judicial district — a district in which heretofore a uniform rate has prevailed — and the population test of subdivision 1 of said section 11, which would justify a lower rate, is inapplicable thereto.

HEARING upon the return to writ of certiorari to review the refusal of respondent to issue a liquor tax certificate upon the relator's application.

Nathan, Leventritt & Perham (Frederick E. Perham of counsel), for relator.

William Vanamee, William E. Schenck and Herbert H. Kellogg, for respondent.

BISCHOFF, J. The premises upon which the relator desires to carry on his liquor business are situated in the lower part of the borough of The Bronx, being within the territory originally

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annexed to the city and county of New York, as a part of the first judicial district, and, in accordance with the Liquor Tax Law, as in operation on the 31st day of December, 1902, the excise tax within that territory was, at that date, $800.

The tax in this particular district (as a part of the city and county of New York, prior to the "Greater New York" consolidation of 1897) has been larger than the tax in the rural districts which became a part of the city under that consolidation, and it has been the intent and purpose of the Legislature to continue the distinction by preserving the scale of payment, in those districts, which obtained prior to 1897. Laws of 1897, chap. 442.

The present controversy turns upon the construction of chapter 115 of the Laws of 1903, which, in the form of an amendment to section 11 of the Excise Law, fixes a definite rate of tax (subdivision 1) according to the population of the "city or borough" in which the business is carried on, and, agreeably to the test afforded by population, taking the borough of The Bronx as a whole, the tax payable by the relator would be but $750. The act of 1903 provides, however (subd. 7), that "The excise taxes assessed under this act in cities containing a population of fifteen hundred thousand or more, which are or shall be formed by the consolidation of territory situate in one or more counties, shall be assessed in the several boroughs or portions of the territory so consolidated to form such city at an advance of one-half in the rate over the amount at which such taxes were assessed on the thirty-first day of December, nineteen hundred and two, in the several portions of the territory so consolidated."

This provision, if controlling, fixes the tax payable by the relator at $1,200, in accord with the express rate fixed (by the population test) for the borough of Manhattan, and in harmony with the statutory conditions prior to December 31, 1902, whereby the rate was uniform for the territory of the first judicial district, in which the relator's premises are situated. If this provision is not to control, the excise tax is lessened in this portion of the borough of The Bronx while increased in every other city in the State. The apparent conflict in the provisions of this statute arises through the measurement of the increased tax by population in a city "or borough" when this one particular borough (The Bronx) had theretofore been divided, for the purposes of liquor licenses, by another line of demarkation, *i. e.*, the limit of the

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first judicial district, which boundary brought a portion of the territory — now forming the borough of The Bronx — within the lines of the district originally regulated, for the purposes of this tax, by the population of the city of New York.

The evident purpose of the act of 1903 was to effect an increase of 50 per cent. in all liquor licenses. This purpose is directly stated in subdivision 7 (above quoted) and the provision may properly be read as a proviso, controlling over possible inconsistencies in the body of the statute. Matter of New York & Brooklyn Bridge, 72 N. Y. 530. Without this proviso, the license rate in the boroughs of Richmond and Queens, as determined by the population test, would be increased much more than 50 per cent., and the necessity of the proviso to maintain the proper proportion of increase is thus apparent. To hold that by the use of the term "city or borough" in subdivision 1, the Legislature intended to reduce the license rate in this portion of The Bronx, would be to disregard the obvious purpose of the act and to give controlling force to an isolated instance of a conflict in the provisions of the statute evidently arising through inadvertence.

Whether the construction of the statute is to be strict or liberal, it must be at least reasonable for the purpose of carrying out the legislative intent, and I find no room for doubt that the provisions of subdivision 7 should control and the use of the word "borough," as applied to the borough of The Bronx, be taken, so far as limited by the proviso. Donaldson v. Wood, 22 Wend. 395; Hayden v. Pierce, 144 N. Y. 516; Blaschko v. Wurster, 156 id. 442; People ex rel. Town of Plattsburgh v. Williams, 162 id. 240.

The tender made by the relator was insufficient and the writ should, therefore, be dismissed.

Writ dismissed.

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MORTON C. BRADLEY and JAMES C. YANCEY, Plaintiffs, *v.* HARRIS WOLFF, Defendant.

(Supreme Court, New York Special Term, May, 1903.)

Equity — Quasi partnership arising out of a joint adventure and contribution — Accounting and dissolution.

Where persons, owning valuable exclusive privileges in certain copyrights and plates, agree with a bookbinder for the manufacture in part from them of certain works intended to be published by these persons during a term of years, they to contribute the privileges, sell the books at fixed rates, turn over the receipts to him and from them be repaid what they had paid for the privileges, he to furnish the labor and material, each party to account to the other and have a certain share in the net profits, the parties are to be deemed joint adventurers and quasi partners occupying fiduciary relations, and hence where the bookbinder, after receiving and using the privileges and receipts, refuses to render monthly accounts as agreed and his books are seriously questioned and the parties disagree, a court of equity will direct a dissolution and compel him to account.

ACTION in equity for the dissolution of an alleged partnership or joint adventure, and for an accounting.

John Larkin, for plaintiffs.

A. Gilhooly, for defendant.

CLARKE, J. This is an action in equity for the dissolution of an alleged partnership or joint adventure, and for an accounting. The plaintiffs, prior to the execution of the agreement at bar, had conceived the idea of publishing and selling by subscription a "History of Nations" in seventy-three volumes, and had acquired the exclusive right to the use of certain copyrights and plate privileges, and had expended in and about said enterprise certain moneys. Said rights and said expenditures were set forth in a schedule annexed to the agreement, and the value thereof was fixed at $4,938.87. The defendant was a bookbinder, con-

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ducting a separate and distinct business, and had been employed by plaintiffs in the manufacture of the publication above set forth. On the 19th of June, 1901, defendant, as party of the first part, and plaintiffs, as parties of the second part, executed an agreement. Plaintiffs claim said agreement established a partnership in this particular enterprise, or at least a joint adventure, and that, therefore, upon the facts shown upon the trial they are entitled to the relief demanded. Defendant claims that no partnership or joint adventure was contemplated by said agreement; that it was as to some parts thereof a purchase and sale agreement, and as to other provisions therein the relation of principal and agent was created; that there was no fiduciary or trust relation; that, therefore, a court of equity has no jurisdiction, and that plaintiffs have an adequate remedy at law. It is clear that the aforesaid agreement was not, and was not intended to be, an agreement to constitute a general partnership between the parties. It is equally clear to me, from its manifold and minute provisions, that it is not a bargain and sale agreement or a mere arrangement by which defendant became the principal and the plaintiffs simply selling agents. I can reach no other conclusion than that it was a joint adventure to manufacture and sell this particular publication, and such other publications as might be determined upon during the ten years of the life of the contract. The cases cited in the able brief submitted by counsel for the defendant fully support his contention that where a party is only interested in the profits of a business as means of compensation for services rendered, he is not a partner in any sense, and his only remedy is by an action at law. Cassidy v. Hall, 97 N. Y. 168; Richardson v. Hughitt, 76 id. 57; Smith v. Bodine, 74 id. 30; Fitch v. Hall, 25 Barb. 13; Lamb v. Grover, 47 id. 317; Bickford v. Searles, 9 App. Div. 158; Black v. Vanderbilt, 70 id. 16; Martin v. Riehl, 27 Misc. Rep. 112; Johnston v. Berlin, 35 id. 146. In those cases, however, the profits were merely designated as a measure by which to determine the plaintiff's compensation. There was no contribution by the plaintiff to the capital by which he gained an interest in the business. In the case at bar, the publications were the product of a mutual investment. The plaintiffs contributed valuable assets in the way of certain exclusive rights and privileges to use copyrights and plates requisite to the manufac-

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ture of the books planned by them. This contribution is stated in the terms of the agreement to "represent the original investment" of the plaintiffs. The defendant contributed the material and labor necessary to manufacture the books. The expenditures of the defendant were "to be charged against the books," and the plaintiffs were to be repaid for the investment "from the proceeds of the sale of the books." Without the contribution by the plaintiffs, although it may have been of much less pecuniary value than the expenditures by the defendant, it would have been impossible for the defendant to carry on the enterprise. Each party was also to contribute services, the defendant having complete charge of the production of as many sets of books as required by the plaintiffs, not to exceed 250 sets a week. If on account of strikes, fire or any other condition not under the control of defendant, he should be unable to deliver publications, then plaintiffs might have the work done elsewhere until defendant could again deliver the publications. The plaintiffs were to sell the books at specified rates, and were to pay agents certain fixed commissions. Each party was to render an account to the other and to share in the net profits upon certain fixed proportions. Judge Gray in Schantz v. Oakman, 163 N. Y. 156, says: "A joint adventure between persons for the business of purchasing or selling property may create a *quasi* partnership relation, which will subject him to the responsibility to account to whom, or by whom, property has been intrusted, or received. * * * Transactions between parties, which will warrant one in holding the other accountable for his acts, must possess the elements of agency and of a trust reposed, with respect to moneys or other property received. The defendant, in such an action, must appear to have been intrusted with property of the plaintiff and, in consequence, to have become bound to reveal his dealings with it." It would be difficult to suggest a joint adventure or enterprise if the case before me be not such a one. The defendant was intrusted with the rights and privileges in the acquiring of which it was agreed the plaintiffs had expended $4,938.87. All funds collected from sales made by the plaintiffs were turned over to the defendant. When the defendant received this money he was intrusted with funds from which (after the expenses of publication and various sums, including the 20 per cent. net profit of defendant, were first deducted), the plaintiffs by the terms of the agree-

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ment were entitled to a repayment of the sum at which their original investment was valued and their share of the profits. In the applying of these funds to the payment for material and labor and other expense incurred at the discretion of the defendant in the production of the books, the defendant stood relatively to the plaintiffs as their agent, he stood in a fiduciary relation, and, in the language of Judge Finch, in Marvin v. Brooks, 94 N. Y. 71, he became a *quasi* trustee of the money in his hands and of the property produced, and the plaintiffs have the right to call him to account in equity. Marston v. Gould, 69 N. Y. 220; King v. Barnes, 109 id. 267; Wilcox v. Pratt, 125 id. 688; Burkhardt v. Walsh, 49 App. Div. 634; Hollister v. Simonson, 18 id. 73. I conclude, therefore, that as to this particular enterprise the parties stand in the relation of *quasi* partners. Having disagreed, the monthly accounts not having been rendered as required, and the books of account being seriously questioned, a dissolution and an accounting are properly prayed for and must be decreed.

Judgment accordingly.

THE CITY OF NEW YORK, Plaintiff, *v.* ARCHIBALD WATTS, Defendant.

(Supreme Court, New York Trial Term, May, 1908.)

New York city — Action to recover personal taxes — Detailed statement of personalty — Books kept open — Delay in delivery of rolls — Demand — Irregularities not prejudicial — Assessment when unassailable.

Under the charter of the city of New York (L. 1897, ch. 378, § 889) it was not necessary in 1900 that a deputy tax commissioner should furnish the board of taxes and assessments with a detailed statement of the personal property of a person assessed.

Where the city sues to recover personal taxes, it, within section 1526 of said charter, sufficiently proves that the tax books were kept open for examination and correction by proving the notice, that they were open, and publication thereof in the required papers.

A delay of eighteen days in the delivery of the assessment-rolls to the receiver of taxes does not vitiate an assessment as the pre-

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vision as to delivery contained in section 911 of said charter is directory merely.

Where the city seeks to recover taxes of an individual a demand of payment is not under said charter or at common law a condition precedent to the action.

He cannot escape liability because of alleged irregularities in the publication of notices required by sections 892, 914, 918 and 919 of said charter where he does not show that he was injured thereby.

Semble, that, where a board of taxes and assessments and its subordinates have jurisdiction to act, an assessment made by them becomes unassailable where the party assessed has never sought to review it by certiorari.

ACTION to collect arrears of taxes.

George L. Rives, Corporation Counsel (Martin Saxe and Henry M. Powell, of counsel), for plaintiff.

John C. Shaw and Henry De Forest Baldwin, for defendant.

GIEGERICH, J. The action is brought to collect personal taxes amounting to $1,123.38 on an assessment of $50,000 in arrears from the year 1900. The defendant put in no evidence, but relies solely upon alleged failures on plaintiff's part to prove certain things that it is claimed should have been proved, or upon facts brought out on cross-examination which, it is claimed, affirmatively show that the tax was not duly imposed. It is admitted that no proceedings by certiorari to review the assessment were ever taken, and the plaintiff insists that the assessment has, consequently, become conclusive upon the defendant, and unassailable by a collateral attack. This proposition seems to have been well established by the decisions. In United States Trust Co. v. Mayor, 144 N. Y. 488, 492, 493, which was an action brought to recover back taxes, paid during a series of years, on the ground that the assessments were void, the court said: "Had the plaintiff instituted a proceeding to review the action of the commissioners, by suing out a writ of certiorari, it would have been in a position to cancel the assessments by reason of the error in their making. This was the remedy which the statute prescribed for the review of assessments, illegal, erroneous, or unequal, and through which a

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reversal might be had, and it is the appropriate proceeding at law to correct the errors of the taxing officers. They were acting judicially in assessing the plaintiff and their action had all the force and effect of a judgment; which, while open to review by some direct proceeding prescribed by the law, is secure against collateral attack;" and, also: "It is necessary for the protection of the taxpaying officers that an attack upon their action should be limited to that which is direct and in the nature of an appeal from it, where that action has been with jurisdiction; and the irresistible inference seems to be that when the legislature has created a system of procedure for the review and correction of assessments, as it has by the act of 1880, it was intended to be an exclusive one." See, also Mayor v. Davenport, 92 N. Y. 604, 611; People ex rel. Mutual Union Telegraph Co. v. Commissioners, 99 id. 254; Brooklyn El. R. R. Co. v. City of Brooklyn, 11 App. Div. 127, 132. On behalf of the defendant, it is rejoined that this is not a collateral attack, but an action to collect the tax, and that the burden has been shifted to the plaintiff to prove every step necessary to the imposition of the tax. This argument, assuming that the burden has been so shifted, would deprive the rule above referred to of much of its efficacy, and on very unsubstantial grounds of distinction. The important point is not where the burden of proof may happen to be in the particular proceeding or action; but whether the issues can be raised at all after failure to raise them in the manner provided by the statute, where, as here, the board of taxes and assessments, and its subordinates, had jurisdiction to act. But, assuming that questions as to the regularity of the assessment can be raised by the defendant, I do not find any fatal defects in the proceedings. The first objection advanced is that the deputy tax commissioner who made the assessment did not furnish to the board of taxes and assessments a detailed statement of the personal property either of the defendant or any one else. It is claimed that this was required to be done under the statute then in effect, viz., section 889 of the charter of 1897, which is as follows: "Section 889. It shall be the duty of the deputy tax commissioners, under the direction of the board of taxes and assessments, to assess all the taxable property in the several districts that may be assigned to them for that purpose by said board, and they shall furnish to the said board, under oath, a detailed statement of all such property, showing

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that said deputies have personally examined each and every house, building, lot, pier or other assessable property, giving the street, lot, ward, town and map number of such real estate embraced within said districts, together with the name of the owner or occupant, if known; (also, in their judgment, the sum for which said property under ordinary circumstances would sell), with such other information in detail relative to personal property or otherwise, as the said board may from time to time require. Such deputies shall commence to assess real and personal estate on the first Tuesday of September in each and every year." I do not think, however, that all these requirements apply to personal property. Most of them obviously do not, and cannot, apply to anything but real estate. All that is required with respect to personal property is covered by the words "with such other information in detail relative to personal property or otherwise as the said board may from time to time require." The point is also made by the defendant that there was an entire absence of evidence that the tax-books were kept open for examination and correction. All that was offered on this point was the notice that the books were so open and proof of the publication of that notice in the prescribed papers. For the defendant, it is insisted that this was not proof that the books were open, but only that the notices so stated. Section 1526 of the Greater New York Charter provides, however, in its last sentence, as follows: "Section 1526. * * * The comptroller shall cause a continuous series of the City Record to be bound, as completed quarterly, and to be deposited with his certificate thereon, in the office of the register of deeds of the county of New York, in the county clerk's office of said county and in the office of the city clerk, and copies of the contents of any part of the same, certified by such register, county clerk or city clerk, shall be received in judicial proceedings as *prima facie* evidence of the truth of the contents thereof." Further, it is claimed that the assessment-rolls are required to be delivered (§ 911) to the receiver of taxes on or before the first day of September, whereas such delivery was in fact made in the year in question on the nineteenth day of that month. It has been established by frequent decisions that such a provision is directory merely and not mandatory. In People ex rel. Rome, Watertown & Ogdensburg R. R. Co. v. Haupt, 104 N. Y. 377, it was said at page 380; "The delivery of the completed and verified roll is

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required by section 9 of the act of 1880 to be made to the town clerk, or other proper officer, 'on or before the first day of September.' The return shows a delivery twenty days later. Such delay did not vitiate the assessment. The provision is directory, and since the relator had his fifteen days, after the delivery to the town clerk, within which to sue out his writ, and did actually do so, we cannot see how it has suffered any prejudice from the delay. * * * We should sacrifice substance to form if we held that such a mistake vitiated the whole assessment;" and in People, v. Allen, 6 Wend. 487, it was said that, "A statute, specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, is directory merely, unless the nature of the act to be performed, or the language used by the Legislature, show that the designation of the time was intended as a limitation of the power of the officer." See, also, Bradley v. Ward, 58 N. Y. 408, and Oswego v. Betts, 25 N. Y. St. Repr. 660. It is also insisted that a demand was necessary before this action could be maintained. The statute in force at the time the default occurred (Charter of 1897, § 930) provided for proceedings to enforce the payment of taxes: "In case of the refusal or neglect of any person to pay any tax imposed on him for personal property," etc. Section 848 of the Consolidation Act required a demand to be made by the receiver of taxes upon the president or other proper officer of "incorporated companies" for the payment of all taxes assessed upon such companies, but I am aware of no requirement for such a demand in the case of individuals. Indeed, I do not understand that the defendant's attorney claims that there is any such statutory requirement, but relies upon Thompson v. Gardner, 10 Johns. 404, to show that a demand is necessary at common law, irrespective of statutes. In that case it was said: "It would be an alarming doctrine to say that a collector of taxes might sue immediately every person on his assessment-roll without first demanding payment of the taxes." It does not appear what, if any, provisions existed in that case for publishing notices of the time taxes were due and the demand therefor, such as did exist when this default occurred. See Charter of 1897, § 919. The difference in the apparent functions of the tax officer in that case and in this is indicated by the title given him, being in the one case "collector" and in the other "receiver." Besides, the statute has distinctly provided for a demand in the

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case of corporations, and has just as distinctly implied by the language above quoted, viz., "refusal or neglect," that no demand is necessary in the case of individuals. My conclusion is that no previous demand was necessary. It is also insisted that there was a failure to comply with the requirements of the charter in regard to the method of advertising the following notices: (1) That the books were open for examination and correction (§ 892); (2) that the assessment-rolls had been delivered to the receiver and that all taxes were due and payable, etc. (§ 914); (3) that any taxes remaining unpaid on November first must be paid before December first or proceedings to collect would be taken (§ 918), and (4) the notice required to be published immediately after the first day of December to all delinquents to pay their taxes to the receiver or to his several deputies in the several boroughs (§ 919). Provision is made for such publication by the various sections in the following language: "In the City Record, and the corporation newspapers, and in such other newspaper or newspapers published in the several boroughs created by this act as may be authorized by the board of city record" .(§ 892); "in the City Record and the corporation newspapers and in such newspaper or newspapers published in the several boroughs as may be designated by the board of city record, or in default of any newspaper being published in any borough, in such newspaper or newspapers having a general circulation in such borough as the board of city record shall direct" (§ 914); and, "in the City Record, and the corporation newspapers, and in such daily papers having a general circulation in any boroughs as the board of city record shall (or may) designate" (§§ 918, 919). The irregularity alleged is that the board of city record, as constituted at the time some of such additional designations were made, or assumed to be made, included the mayor, the deputy comptroller and the acting corporation counsel, and that there was no proof of the authority (as required by sections 150 and 256) of the latter two officers to act in place of their respective chiefs. But even if such be the fact, and the action of the board might be invalid and ineffective for some purposes because of such want of authority on the part of two of its acting members, still the defendant is not in a position to raise the question since it has not been shown that he has been prejudiced. The notices were in fact published and the method by which they came to be published, so far as this defendant is

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concerned, is immaterial. This want of injury shown is a sufficient reply also to the further objection made by the defendant, that the notice prescribed by section 914 was not published "immediately," as required by the statute but on October first the assessment-rolls having been received on September nineteenth preceding. The doctrine of the strict construction of statutory requirements and of minute scrutiny of proceedings leading to the imposition of taxes is invoked by the defendant's counsel, but in my opinion, it does not apply under these circumstances. This is not the case of a citizen deprived of his property and seeking to regain it (as in an action to redeem after a tax sale), but of a citizen seeking to evade his share of necessary burdens which his fellow citizens have borne without protest or resistance. Nevertheless, if the defendant had shown that he was injured by any of the irregularities alleged, an offset should doubtless be allowed to the extent of such damage. But he did not show such injury, and it is difficult to conceive how any could have resulted to him from any of the circumstances complained of, unless it be from those relating to the assessment; but, as above pointed out, any questions as to those should have been raised earlier and in a different manner, viz., by certiorari within the time limited by the statute. My conclusion is that none of the objections raised are sufficient to defeat the plaintiff's right to recover, and that judgment should be granted for the amount demanded in the complaint, with costs.

Judgment for plaintiff, with costs.

JOHN D. SLAYBACK, Plaintiff, *v.* CHARLES M. RAYMOND, ANNIE LOUISE RAYMOND, his Wife, and the CARBON STEEL Co., Defendants.

(Supreme Court, New York Special Term, May, 1903.)

Equity — Duty of fraudulent agent to account to principal — Discovery or notice of the facts of the fraud — Statute of Limitations — Laches — Code Civ. Pro., § 382, subd. 5.

Where the plaintiff, the financial backer of a corporation and interested in it as creditor bondholder and stockholder, having become involved requests the defendant its president to procure financial

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aid for it from a capitalist and the defendant subsequently and in 1898 induces the plaintiff to transfer all his stock to him upon the false statement that the capitalist requires the transfer as a condition of rendering such aid, equity will on the ground of fraud compel the return by the defendant of such of said stock as stands on the books in his name, or in the names of his nominal transferees, and make him account for such of it as cannot be returned and for all dividends where the evidence tends to show that the plaintiff neither discovered the facts constituting the fraud, nor was put on inquiry in regard to them, until 1898 and the action was begun in 1900.

No question of *laches*, in the strict sense of that term, can be involved in an action brought under Code Civ. Pro., § 382, subd. 5 and particularly where the parties have not changed their positions.

ACTION to recover, on the ground of fraud, a judgment for the return by the defendants Raymond of certain shares of stock in the defendant company and for an accounting.

Bacon & Merritt (McCurdy & Yard, of counsel), for plaintiff.

Hess & Holstein (Louis Marshall, Charles A. Hess and Jacob Halstead, of counsel), for defendants.

LEVENTRITT, J. Under the authority of Marvin v. Brooks, 94 N. Y. 71, and allied cases, this suit is well brought in equity.

On the merits I find the plaintiff's story reasonable and worthy of credence, while I have not been impressed with the likelihood of the defendants' version. I have reviewed the testimony with great care with the result that the view I took of the facts on the trial, when I saw and heard the witnesses before me, finds corroboration in many details.

The plaintiff was the financial backer of the Carbon Steel Company of New Jersey and this fact was generally known; the defendant was its executive head but so far from being possessed or known to be possessed of large means, there are various items of evidence to the contrary. The plaintiff's private firm being threatened with financial embarrassment in the generally depressed and tightened conditions of 1893 requested the defendant to seek the intervention of a capitalist at Pittsburg, one James Hemphill, who was interested in several concerns supplying the Carbon Steel Company with material and whose business

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ability and financial strength had arrested the decline of another company, to the end that the impending insolvency of the plaintiff's firm should not affect sympathetically the standing of the Carbon Steel Company when its recognized financial support should have become impotent. The plaintiff offered to give up one-half his stock holdings in the event that Hemphill could be induced to take hold and succeed in having credit extended to the Carbon Steel Company. The defendant went to Pittsburg, returned and, according to the plaintiff, reported that Hemphill would accept only on condition that plaintiff should yield his entire stock holdings and that his wife should turn over one-half of her first preferred stock, that one Robinson, who was vice-president of the company, had to give up all his stock, and that the defendant "had to do the same." The plaintiff, for himself and his wife, both being creditors of the company to a large amount on notes as well as holders of a substantial block of bonds, bonds, agreed to the proposition and delivered the stock to the defendant for transfer to Hemphill. It is undisputed that not a share of stock was ever delivered to Hemphill. The defendant claims that it was given to him individually to enable him to control the company on his agreement personally to guide it over the shoals into safety. His version is that the plaintiff requested him to induce Hemphill to accept a receivership of the company, that he went to Pittsburg on this mission, that Hemphill refused, that he carried this refusal to the plaintiff and then made an alternative proposition to the effect that if the plaintiff would give up all his stock, and his wife half of hers, he "would find a party or parties to loan us (The Carbon Steel Company) the money and give us the credit, and carry on the company, that I would guarantee his note for himself and his wife and would guarantee the company and make the bonds good." As to the Robinson stock, the defendant testified "I said Mr. Robinson would have to give his stock if I needed it; it was necessary for me to have control of the company in order to warrant my attempting or doing — taking the risk that I was going to take to carry this out as a personal obligation."

I find myself unable to accept this story of the defendant. I deem it necessary to refer merely to some of the many facts which show its improbability. The relations between the plaintiff and the defendant were such that the plaintiff was necessarily

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fully advised of the defendant's financial standing. It seems most unlikely that where, of the two, the plaintiff had always been called upon to supply the financial support of the company, he should promptly, on the defendant's naked oral promise to see the company through and secure the necessary party or parties to loan money and give credit, turn over his all, especially where, according to the defendant's version, a simple question of control was involved. If control of the stock was all that was required, it would seem that the plaintiff having far more at stake than the defendant, and being admittedly on most friendly terms with him, would readily have acquiesced and voted his stock as the defendant required it. Or, if as the defendant claims, he needed stock to give to "other people," which seems to be his main contention, that the plaintiff would willingly have consented, from time to time, to contribute his proportionate share rather than divest himself of his entire holdings at once when the "other people" were not yet determined. Further than this the defendant testified that his wife gave up all her stock but that he never called upon Robinson to give up his. The reason assigned for not requiring the latter to do so is entirely unsatisfactory. "Because he would always vote any way I voted" is the defendant's reason. But if control was all that was sought, it is quite evident that the plaintiff would have voted similarly and the defendant concedes that though Mrs. Raymond, his wife, would likewise have voted the way he told her to, yet he took her stock. Further, if Robinson had been called upon to yield his stock, it is manifest that just by that amount the plaintiff and his wife would have been relieved from yielding theirs. Finally, the use made of the stock discredits the version of the defendant. It went in part to employees; a small portion to Newton Hemphill, the son of James Hemphill, but the bulk of it to nephews and nieces of the defendant who could render no conceivable service to the corporation. It also appears quite satisfactorily that these transfers to relatives were merely nominal, for the defendant testified that from the beginning of his holding of this portion of the transferred stock to the present day the dividends thereon have been paid to him personally.

Again, it does not appear that after the transfer by the plaintiff to the defendant, the latter ever did get a single party or parties to advance money or that a single new avenue of credit

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was opened. All that happened was that the creditors of the company extended the time of payment. The defendant, driven to cover, rests the entire consideration for the transaction between him and the plaintiff on the latter's desire to save the money loaned to the corporation and to see the bonds made good. But it is a tax on credulity to be asked to believe that after the plaintiff had sought the aid of a large capitalist he would on the first suggestion, without bargain or parley, accept the proposition of one who, on behalf of the company had theretofore called on the plaintiff to come to its financial assistance, whose own financial standing as known to the plaintiff did not warrant the assumption of any such personal liability, who offered in place of the named capitalist unnamed parties to be secured in the future and who above all offered an unenforceable oral personal guarantee in consideration of the plaintiff's turning over every dollar of stock he had in the company, and that at a time when under the defendant's own version the necessity therefor had not arisen. I accept the story of the plaintiff.

There remains to be considered the question whether the plaintiff's remedy is barred by the Statute of Limitations. The plaintiff sues to recover a judgment on the ground of fraud to procure the return of certain shares of stock, their transfer on the books of the company and an account for dividends and for such of the stock as cannot be returned. The fraud was committed in the month of July, 1893. The action was begun on January 5, 1900. The plaintiff claims that he did not actually discover the fraud until the spring of 1898, when Robinson, who had been told by Raymond, informed him of it. The plaintiff is entitled to credence. But the question under the authorities is not so much one of actual discovery as it is whether any facts came to plaintiff's knowledge which fairly put him on inquiry as to the commission of the fraud which should have awakened suspicion, and which made it his duty further to investigate. Higgins v. Crouse, 147 N. Y. 411, 417. Knowledge is imputed to a party which he ought to have had and would have had if he had done his duty and we are required to say "for the purpose of the Statute of Limitations that there was in law a discovery of the facts which constitute the fraud." Ibid. Was there in law such a discovery? This case falls under subdivision 5 of section 382 of the Code, barring in six years "an action to procure a judg-

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ment, other than for a sum of money, on the ground of fraud," etc. Bosley v. National Machine Company, 123 N. Y. 550.

The fraud having been perpetrated in July, 1893, the six-year period began to run from the date that the plaintiff discovered or should have discovered the fraud. As the action was begun on January 5, 1900, we are concerned here only with the question whether the plaintiff was put on his inquiry between July, 1893, and January 5, 1894, the beginning of the six-years' period terminating on January 5, 1900, the date of the service of the summons. The defendant claims that the plaintiff should have had knowledge and was put on his inquiry, and, therefore, had actual knowledge in law, by the following facts. At the time of the fraudulent representations the plaintiff was treasurer of the corporation, having access to its books, that he continued treasurer for a period of three or four years and a director until just prior to the commencement of the action, that he was acquainted with Mr. James Hemphill and his son, that the latter frequently came to New York and that the plaintiff could thus have learned from Newton Hemphill whether or not James Hemphill had received the surrendered stock; that the plaintiff was present at the various annual meetings of the Carbon Steel Company of West Virginia, organized in 1894, the successor corporation of the Carbon Steel Company of New Jersey; that he was frequently in the chair; that the list of stockholders was read and that the plaintiff must have or should have known that the name of James Hemphill was not on the list. The defendant also claims that the plaintiff as treasurer signed the stock certificates of the West Virginia corporation which were substituted for those of the New Jersey corporation; this, however, the plaintiff denies, and as the means of proof were available to the defendant, I reject this item of evidence. It is necessary then to consider how far the items stated, or any of them, should have awakened suspicion on the part of the plaintiff and put upon him the duty of inquiry. I may say here, as bearing on the merits of the case, as well as the particular phase now under discussion, that the defendant had much corroborative evidence available to him in the books and records of the corporation which he omitted to produce.

The fact that the plaintiff was an officer of the several corporations and had access to the books advised him of nothing.

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He had surrendered his stock under the belief as he testified on cross-examination that it was gone forever. Until 1898 he had no suspicion that he had been defrauded. There was thus no occasion to go to the books to look for something he did not suspect. This assumes of course that the plaintiff should have known James Hemphill to be a stockholder of record, an assumption that may be unwarranted in view of the testimony of the defendant's witness Brinner that thousands of shares stood nominally in his name of which other persons were the owners. The plaintiff's acquaintance with the Hemphills and the presence of the son in New York on divers occasions cast no duty of inquiry on the plaintiff to ask of the son whether the father had received what the plaintiff had no reason to assume he had not. The question of facts known to the plaintiff from which the inference of fraud followed as a matter of law reduces itself to such facts as the plaintiff must have learned at the annual meetings, or rather at the single annual meeting if any preceding the year 1894, for any facts learned in that year or thereafter can have no bearing on the presumption of knowledge we are considering, as the action was begun within six years of January 5, 1894. Although the record contains no specific item of testimony when the annual meetings were held, there is in evidence a series of statements of the financial condition of the corporation, all dated October, which indicate that the annual meeting were held in or after that month. In other words, I shall assume that one annual meeting was held between July, 1893, and January, 1894. No importance is to be attached to the fact that the elder Hemphill, a man well on in years, a resident of Pittsburg, and who, as disclosed by the record, was an infrequent visitor at New York, was not present. Conceding that the stockholders' list was read at the annual meeting of 1893, although the only evidence is that it was "usually read off," and that the name of James Hemphill did not appear therein, two considerations suggest themselves. First, there is no positive proof in the record that the list was read or that the plaintiff heard it read at the annual meeting of 1893. Inquiry on the trial was merely directed to the meetings of 1894 and subsequent years. The evidence in the record on this point is as follows: "Q. And you also attended the various annual meetings, didn't you? A. I did. Q. And at those annual meetings you were generally in

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the chair? A. Frequently. Q. And you conducted the business that was transacted at those meetings? A. I presided. Q. At those different meetings you knew who voted there either in person or by proxy, did you not? A. The list was usually read off. Q. You did not understand from any list which was read off at any of those meetings which were held in 1894, 1895, 1896, 1897 and 1898 that Mr. James Hemphill held any stock in the Carbon Steel Company? A. I have no recollection of ever having heard his name. Q. And you attended at all those meetings that I have mentioned? A. I think so. Q. And you were actually in the chair at all those meetings? A. Most of them. Q. You were either in the chair or actively participating in what was being done? A. Yes. Q. And heard the list read off? A. Yes."

There is thus neither here nor elsewhere in the record any positive proof that the list, which was "usually read off," was in fact read at the meeting in 1893. Inasmuch as the Statute of Limitations is an affirmative defense, the burden was on the defendant to show that the list was read off in 1893; that the plaintiff heard it and that having heard it, the omission of the name of James Hemphill to whom he thought his stock had been transferred should have been to him so striking as forthwith to arouse his suspicion and put him on his inquiry. Secondly, the name of Hemphill was read off at this meeting, not the name of James Hemphill but that of the son, Newton Hemphill. The latter was both a stockholder and director. And it certainly is not unreasonable to assume, in view of the fact that the plaintiff had no further interest in this stock and believing that it was gone forever, and in view of the fact that the argument as to what the plaintiff must or should have known reduces itself solely to the inference to be drawn from the failure to hear the name of James Hemphill read off, that his hearing the name of a Hemphill was quite sufficient to let unborn suspicion remain unborn. I am, therefore, of the opinion that no facts came to the plaintiff's knowledge which fairly put him on his inquiry prior to January 5, 1894.

I have treated the question of the Statute of Limitations regardless of any question of *laches* for I am of the opinion that this being an action for fraud under section 382, subdivision 5, no question of *laches,* in the strict sence of that term, is involved.

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See Throop's Code, note to section 414. The Court of Appeals has said: "Whether the equitable doctrine of *laches*, as distinguished from the Statute of Limitations, now exists in this state, is open to serious doubt." Cox v. Stokes, 156 N. Y. 491, 511. Derby v. Yale, 13 Hun, 273, held that it did not. See, also, Kenyon v. National Life Association, 39 App. Div. 276, 294; Wood Lim., § 62. The case relied on by the defendant, Calhoun v. Millard, 121 N. Y. 69, is not to be taken as an authority in point. It seems to be in conflict with the later *dictum* in Cox v. Stokes, *supra*, and, in any event, arose under a different and very general section, and did not involve the question of fraud. In this case we have the specific statutory provision that the plaintiff shall have six years after the discovery of the fraud within which to bring his action and I see no room for the application of an equitable doctrine in an equity suit where the statute has defined within what time suit may be brought. Further, even *laches* are ordinarily not invoked unless the parties have changed their positions; in this case, so far as the bulk of the stock is concerned, the defendant is to be regarded the owner to-day for his gift to his nephews and nieces retaining unto himself the dividends shows, at most, a nominal transfer. The court will not invoke the doctrine of *laches* to offend its own conscience.

I am of the opinion that the plaintiff is entitled to judgment against the defendant Raymond. No case has been made out against the defendant's wife and as to her the complaint should be dismissed without costs.

Judgment accordingly.

Matter of the Estate of Richard Rainforth, Deceased.

(Surrogate's Court, New York County, May, 1903.)

Administration — Executor cannot speculate in claims against his estate — Expenses of collecting agent — Commissions, etc., refused.

An executor cannot be permitted to retain a profit which he made by speculating in claims against the estate of which he was executor.

Where he used estate moneys to prosecute his speculations, procured assignments of the claims to be made, for less than their face value,

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to his dummy and afterwards charged them in his account as paid in full, he was deemed guilty of actual fraud and his account was surcharged with the profit he made.

While an executor may employ another, even his own son, to collect claims against the estate the burden is on the executor to prove that the services and disbursements of the collector were rendered and made and both must be reasonable.

The surrogate refused this executor commissions and costs and charged him personally with the costs of the proceeding for an accounting.

PROCEEDINGS upon the judicial settlement of the accounts of an executor. Objections to account.

Hoffman & Wahle, for executors.

Edward Farnham Todd (Frank Walling, of counsel), for contestant.

THOMAS, S. The testator died July 21, 1897; letters testamentary were issued to two executors on September 18, 1897; on September 16, 1899, an intermediate account was filed by the executor now accounting, who has always had exclusive charge of the estate, and proceedings were taken for its judicial settlement. Objections were filed, a trial was had before a referee and that contest was ended by an amended decree, dated October 24, 1901. Subsequent to that decree an application was made by the contestant for leave to file further objections to certain disbursements set forth in the said intermediate account because of the recent discovery by the contestant of evidence, not available on the previous trial, tending to show that the executor was personally interested in the purchase of claims at a discount which he paid in full. These items had not been litigated. The order then made permitted further objections to be filed, but reserved their trial until a later accounting.

The present proceeding is for the judicial settlement of an account filed by the executor on March 1, 1901. The objections filed attack some items in the previous intermediate account, interposed under the order already referred to, and also other items appearing in the final account. A trial has been had before a referee, to

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whose report exceptions have been filed. The present application is based upon these exceptions.

The referee correctly determined that all matters included in the intermediate account and litigated before the referee in that proceeding were conclusively settled and determined by the decree of October 24, 1901. This excluded from his consideration the items of wages paid by the executor to his son, as his bookkeeper or collector during the period covered by the intermediate account. The objections touching the items in the intermediate account properly before the referee were those to the payment of assigned claims which have already been referred to, and evidence as to them was taken before him. His disposition of those objections will first be considered.

Certain claims against the estate of the decedent were assigned by their owners to one Gustav Hellrung, by written assignments, at a uniform discount of 25 per cent. from their face, and were paid in full and with interest by the executor. It is claimed that the executor should be charged with the amounts of profit realized from these transactions. These claims were as follows: Koken Barber Supply Co., purchased for $1,705 and paid at $2,016; Doppler & Harris, purchased for $298.07 and paid at $419.65; B. & I. Eschmann, purchased for $255 and paid at $361.45; I. Lewis & Sons, purchased for $397.56 and paid at $536.28.

As to the Eschmann claim, the referee reports that the objection is sustained, and surcharges the executor's account with $106.45, and to this the executor does not except. The date of the assignment of this claim is October 12, 1897, and the amount then owing them is recited in the assignment to be $314.50. Seventy-five per cent. of that sum is $255.10, and a check of the executor for that amount was paid by the Mutual Bank on October 18, 1897.

As to the Lewis claim, the evidence requires a finding that the claim was paid in full, and no exception is taken to the disallowance of the objection thereto. The referee finds that the objections as to the other claims, to wit, those of Koken Barber Supply Co. and Doppler & Harris, were not sustained, and his conclusion is excepted to.

All of the active negotiations for the purchase of these claims were had by the executor personally, or by his son, who was employed by him as executor. The Koken Barber Supply Co. was located at St. Louis, and the arrangement for sale of the claim

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was made, in part at least, by correspondence with the executor. A final letter from its secretary to the executor, dated December 23, 1897, thanks him for his kindness in the matter, and notifies him that the assignment and other papers had been sent, with a draft on his son for $1,705, to the National Park Bank, and would be delivered on payment of draft. This draft was paid by the son about December 27, 1897. At that time the executor had three bank accounts, one as executor in the Continental Trust Company, one as executor in the Mutual Bank, and one as an individual, upon which either he or his son of the same name could draw, in the West Side Bank. At that date he had, as shown by his account, in his hands as executor a sufficient balance to make this payment from the funds of the estate. His balance as executor in the Continental Trust Company on December 27, 1897, was $1,400; on December 28 a check drawn by him for $1,335 was paid. No disbursement shown on his account or suggested by him will explain this $1,335 check, and the strong inference is that this sum of $1,335 went towards the payment of the Koken Company draft. A receipt for the payment of $2,016.30 on this claim, signed by Gustav Hellrung, dated August 2, 1898, is submitted. Payments to other creditors are further fortified by cancelled checks, but no such check accompanies this voucher, and the transcripts of the bank accounts of the executor do not disclose any such check.

The claim of Doppler & Harris was assigned to Gustav Hellrung by assignment, dated October 4, 1897, drawn in the handwriting and witnessed by the executor's son, and in it the amount of the claim is said to be $397.43. It is in proof that 75 per cent. of this, or $298.07, was paid by the executor to Mr. Harris on that day, and the account of the Mutual Bank shows that the check of the executor on his account in that bank, as executor, for precisely that amount, was paid on that day. The receipt of Gustav Hellrung for $419.50 on this claim is not fortified by any check, and no record of such check, if any was issued, is in evidence.

These facts establish, *prima facie*, that these claims were purchased with the funds of the estate, and suggest the inference that the assignments were mere covers and blinds, behind which the executor could take the profits of the transactions for his own benefit.

The testimony of the executor and of Hellrung is to the effect that

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the money was actually advanced by Hellrung, and that the money so advanced, or a part of it, was first deposited to the credit of the executor as such, and then withdrawn to pay for the assignments. This does not impress my mind as a probable story. The obvious purpose of depositing trust funds in an account which shall stamp upon them their trust character is to mark their true ownership. That an executor meditating a use of cash in his hands which would be lawful if it was not assets of the estate, and which would plainly be fraudulent if it was such assets, should deliberately put the trust label upon it, only a few days before carrying out his plan, is incredible.

Not only does the account given by the executor fail to satisfy me of its inherent probability, but it impresses me that he was not trying to tell the truth, and some of the facts lead me to conclude that he is not a credible witness. He stated, for instance, in the early part of his examination, that the discount on the claims was 15 per cent., when the clear proof and his own subsequent admission are that it was 25 per cent. in each case. In at least one instance, established so clearly by proof that the referee's finding convicting him is not excepted to, the executor did, in relation to the assignment of another claim to Mr. Hellrung, just what he is here charged with. His account also contains an utterly false and fictitious charge for notary's fees not paid and not shown to have been earned, but fortified by oaths and vouchers, which was not abandoned until the proof against him was overwhelming. He took a voucher from the undertaker for burying his testator for $178.50, and asked and obtained allowance of it at that sum, though all he paid was $140. When pressed to proceed before the referee and seeking for delay, he walked to his physician's office and induced him to write, in his presence, an affidavit to the effect that he was then "ill in bed;" he had the physician go to his own place of business and swear to this false statement as true, and he then procured it to be submitted to the referee as a basis of judicial action. The uncorroborated testimony of such a witness, given in his own interest, is not entitled to absolute credence.

Mr. Hellrung is, on the clearest evidence and on the finding of the referee not excepted to, guilty of making at least one false voucher, and of attempting to aid in diverting a part of this estate from the parties entitled, by misrepresentation of facts. His story

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about the use of cash instead of checks is not credible. If he kept no record of his large money transactions his associate in these matters had three bank accounts, and, in his dealings in this estate which can bear the light, he used them. Our concern is not with him, but with the executor.

The referee proceeded as if the sole question concerning the purchase of these claims was as to whether the funds of the estate were used. On that theory he erroneously excluded the transcript of the personal account of the executor with the West Side Bank. The executor is to be charged with the entire amount of the profit of those purchases if he had any interest in them. If he used the money of the estate in prosecuting his speculation, and took assignments to his dummy, he was guilty of an obvious direct fraud. If he used his own money he was guilty of a constructive fraud, or an offense against his duty as an executor, and he cannot be permitted to retain the profits of a speculation in claims against the estate of which he was the trustee (Van Horne v. Fonda, 5 Johns. Ch. 388, 408; Ex parte Lacey, 6 Ves. Jr. 625, 628.

As to these two transactions I will reverse the finding of the referee and find as fact that the claims were purchased by the executor with the funds of the estate, and that the assignments were procured solely for the purpose of furthering his own personal interest, and I will determine that his account must be surcharged to the extent of the entire profit.

The executor makes charges for services alleged to have been rendered by his son as bookkeeper and collector, and for disbursements for car fares and stamps aggregating $905.11. The entire amount collected was $2,028.55, and I have been led to make a somewhat careful examination of this claim. The only books submitted are a day-book, out of which a large number of pages have been torn, leaving entries on dates all earlier than the period of this accounting, a ledger and a letter-copying-book. The ledger account contains entries of the receipts shown in the account, and its references to pages of another book lead me to infer that a day-book was kept, and that the original entries of these collections were on pages 44 to 50 of that book, seven pages in all, which was not produced before me, though the minutes of the trial before the referee show that it was before him. No bank-book, or any book showing checks drawn by the executor, is before me. The amounts collected were all from twenty-two separate accounts. The busi-

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ness of the testator was the sale of the fixtures and furniture of barber shops, upon which he took back chattel mortgages, payable in installments, and these accounts were transactions of this nature. The payments were generally made monthly, though in some instances the periods for payments were longer. In view of the remarks of counsel for the executors as to the difficulties of collection, I was somewhat surprised to notice the promptness with which most of the payments were made and the smallness of loss. All of the debtors were in New York county except two, who were in Brooklyn, and one who was in West Orange, New Jersey. The letter-book contains copies of letters written by the executor, reminding delinquents that the collector had called and that they were in default, and I conclude that personal demands were made. It was not unreasonable for the executor to employ a collector, but the amount to be allowed him for this cannot be fixed arbitrarily by him without proof of its reasonableness. This is not a claim of a creditor of the decedent against the estate, which may be allowed by him so as to establish a legal presumption, but it is a claim of his own as to which the burden of proof rests upon him, and I do not find evidence in the record as to the value of the service rendered him, or the actual disbursement for "car fares and stamps" which would sustain his contentions.

In the case of the account against Antonia Gianattasio, of West Orange, New Jersey, on pages 41 and 42 of the ledger, the only debtor out of this city, a commission of $1.50 for each collection of $10 is deducted, and the amount obtained, or $8.50, is put into the account. There were 233 entries of receipts, varying from 75 cents to $40 each, and an aggregate charge averaging nearly $4 for each of these collections seems to me exorbitant. We will deal generously with the executor if we allow him for the collections made in New York and Brooklyn at the same rate he paid for the New Jersey collections, to wit, 15 per cent. The recording of the fact that such collections had been made should be included in this. All of the charges for services of a collector and for car fares and stamps will be disallowed in excess of $304.28, allowed in lieu thereof.

The services rendered by the counsel for the executor are conceded to be of the value claimed by and paid to him. They were rendered in the interest of the estate. None of them were rendered in bolstering up or defending the transaction commented

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on in this memorandum. The payments to counsel are, therefore, approved.

I will not impose any charge on the executor for interest. As a matter of fact he never had any large amount of money on hand, though his account may appear to show otherwise, because he used funds of the estate for purchasing claims against the estate. For this he is already charged, and it would be difficult to compute a fair charge for interest on the balances he retained without risk of doing him an injustice.

In all other respects the report of the referee is confirmed.

The character of the objections sustained and of the facts disclosed by the record is such as to require that the executor should forfeit every claim to discretionary favor. He will be refused commissions and costs, and he will be charged personally with the costs of the proceeding.

Decreed accordingly.

Matter of the Estate of MARY CHASE, Deceased.

(Surrogate's Court, Saratoga County, May, 1903.)

Express trust — Words creating one — Res adjudicata — Surrogate may appoint a successor to a deceased testamentary trustee.

A devise made by a testatrix to one of her executors of "the management and control of my real estate, with power to sell and convey same as I now possess (after my death)" creates an express trust and vests the legal estate in the trustee, subject only to the execution of the trust.

A decree made on a judicial settlement of the executor, adjudging that he hold the balance in his hands in trust for the beneficiary named in the will, concludes parties to the decree as to the existence of the trust and as to how the executor now holds the *corpus*.

Code Civ. Pro., § 2818, as amended in 1903, authorizes a surrogate to appoint a successor to a deceased testamentary trustee and therefore the Supreme Court no longer has exclusive jurisdiction in such case.

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Misc.] Surrogate's Court, Saratoga County, May, 1903.

APPLICATION to the surrogate of Saratoga county to appoint a successor to a sole testamentary trustee who has died.

Irwin Esmond, for petitioner.

Alfred A. Guthrie, for surviving executor.

LESTER, S. Mary Chase departed this life, on or about April 7, 1901, having first made her last will and testament which was duly admitted to probate by the surrogate of the county of Saratoga on the 7th day of September, 1901.

The testatrix provided in her said will, among other things, as follows: "*First.* After all my lawful debts are paid and discharged, I give, devise and bequeath to my sister, Elizabeth A. Vandervort, the income of all my real estate, during her life, if she survives me. * * * *Seventh.* I give, devise and bequeath to one of my executors hereinafter named, George W. Rowley, the management and control of my real estate, with power to sell and convey same as I now possess (after my death)." The testatrix also provided that, after the death of her sister, the residue and remainder of her estate should go to her nephews and nieces, named in her will, share and share alike.

George W. Rowley assumed the management and control of the real estate mentioned in the will, and exercised the power to sell therein given him and, pursuant to such power, sold all the real estate of the testatrix and converted it into money and has since died. At the time of his death the net proceeds of the real estate were represented by a bond and mortgage given to him "as executor of the last will of Mary Chase, deceased," and cash deposited to his credit, "as executor of the estate of Mary Chase, deceased," in the First National Bank of Ballston Spa, N. Y.

One of the nieces of the decedent, Mary Chase, who is entitled under the provisions of her will to a share of the residue of her estate after the death of her sister, Elizabeth A. Vandervort, has applied to the surrogate of Saratoga county to appoint a successor to George W. Rowley as testamentary trustee under such will. The surviving executor of such will, William S. Kertley of Albany, appears in opposition to this application, and urges several objections which it is necessary to consider.

First. It is claimed by the surviving executor that no legal trust was created by the will; that the provisions above quoted simply

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conferred upon George W. Rowley certain special powers and duties which he was to perform in his capacity as executor and which now devolve upon the surviving executor. It seems clear to me that this position of the surviving executor is not justified by a correct interpretation of the will in question which gave to George W. Rowley an active duty respecting the real estate of which the testatrix died seized. It bestowed upon him, in express terms, the management and control of the real estate and gave him the power to dispose of it; and it gave to the sister of the testatrix the right to the income of the real estate during her lifetime. This provision seems to omit nothing which is required to constitute a trust to receive the rents and profits of the real property of the testatrix and apply them to the use of her sister during her life and to appoint George W. Rowley the trustee and vest in him the legal estate under the provisions of section 80 of the Real Property Law. L. 1896, ch. 547.

Prior to the death of George W. Rowley, he filed an account of his proceedings as executor, and presented to the Surrogate's Court his petition for the judicial settlement thereof. William S. Kertley, his coexecutor, appeared in person and by Alfred A. Guthrie, his attorney, and such proceedings were had that, on the 17th day of February, 1903, a decree was made at a Surrogate's Court held in and for the county of Saratoga on that day, in which, among other things, it was ordered, adjudged and decreed that the said executor, George W. Rowley, hold and retain the balance remaining in his hands, namely: the sum of $1,166.72 in trust to pay the income of said balance to the said Elizabeth A. Vandervort during her lifetime and, upon her death, to pay the legacies mentioned and set forth in the last will of said deceased.

If there were any doubts arising from a consideration of the provisions of the will, such doubts would seem to be set at rest by the provisions of this decree. The parties appearing in opposition to the present application were parties to the proceeding in which the decree was made and no appeal therefrom has been taken. This decree is an adjudication upon the question of the existence of the trust and the capacity in which the deceased trustee held the fund involved in this application.

The income which he collected from the trust estate came into his hands as trustee and not as executor, and formed no part of the estate over which the executors, as such, had control. Upon his

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death, the trust vested in the Supreme Court and the surviving executor does not succeed to his authority in respect to the trust estate.

Second. It is, therefore, necessary to appoint a successor, and the next question to be considered is whether the surrogate has power to make such appointment. It was urged by the counsel for the surviving executor, upon the argument, that the surrogate had no such power, but that the authority contained in section 2818 of the Code was repealed by the Real Property Law, passed in 1896 which provided that, upon the death of the sole trustee of an express trust, the trust, if unexecuted, should vest in the Supreme Court and be executed by some person, appointed for that purpose, under the direction of the court. It is not necessary to discuss this proposition in view of the fact that, since the passage of the Real Property Law, the Legislature of 1903 amended section 2818 of the Code and re-enacted the provisions authorizing the appointment of a successor, upon the death of a testamentary trustee, by the surrogate.

I, therefore, hold that the surrogate has power in this case to appoint a successor to George W. Rowley and, the beneficiary having been brought into court by a citation duly served upon her, it becomes my duty to make such appointment.

A decree may, therefore, be entered appointing William A. Mehan, Esq., of Ballston Spa, N. Y., successor to the said George W. Rowley, as trustee of the trust created by the will of the testatrix upon his filing his official oath and executing and filing, according to law, a bond in the penal sum of $2,400.

Decreed accordingly.

ROSCOE CONKLAN, Respondent, *v.* THE METROPOLITAN STREET RAILWAY CO., Appellant.

(Supreme Court, Appellate Term, May, 1903.)

Evidence — Impeaching one's own witness.

Where a passenger of a street railway company sues it for damages for personal injuries alleged to have been sustained by him by the starting of its car before he had had time to alight from it and the conductor thereof, when called by the defendant, corroborates

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the plaintiff's statement, the defendant cannot subsequently prove by the conductor his hostility to the defendant, a prior inconsistent statement made by him and a report he made to the defendant, and, by others, how the report came to be made, what the custom was in such matters and how and why the conductor had been discharged by the defendant — and this because such evidence is not admissible as relating to the issues of the controversy and the defendant cannot show inconsistent statements of its own witness, and inconsistent facts, for the purpose of impeaching him.

APPEAL by defendant from a judgment of the City Court entered in favor of the plaintiff upon the verdict of a jury and also from an order denying defendant's motion for a new trial.

H. A. Robinson (Bayard H. Ames and F. Angelo Gaynor, of counsel), for appellant.

Frank Herwig, for respondent.

FREEDMAN, P. J. The action was brought to recover damages alleged to have been sustained by the plaintiff by reason of the negligence of defendant's servants in prematurely starting the car from which the plaintiff as a passenger was alighting. At the trial evidence was given on behalf of both parties and the case was submitted to the jury who found for the plaintiff. Upon this appeal the defendant in its brief urged but one point; "Defendant's exceptions to the admission of evidence present reversible error."

The case shows no such exceptions and no such error. From the elaboration of the point in the brief it appears, however, that it is the exclusion, and not the admission, of certain evidence which is complained of. The particular point in dispute in the case was as to whether the plaintiff alighted from the car before it stopped, as claimed by the defendant, or whether, as he attempted to alight, the conductor prematurely started the car again, after it had been stopped, before the plaintiff had a reasonable opportunity to alight, as claimed by the plaintiff. Upon this issue the defendant examined as a witness the conductor of the car and his testimony substantially corroborated the version of the plaintiff. In order to contradict him as to this material point the defendant offered to cross-examine the witness to prove

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his hostility to the defendant, to prove an alleged prior inconsistent statement and a report made by him and to prove how he made this report, all of which offers were, on plaintiff's objection, refused by the trial judge. The defendant further offered to show by other witnesses the statement and report alleged to have been made by the conductor, how and when it was made, and what the custom was with reference to making statements, and that the conductor had been discharged from the employ of the defendant and what for. All this testimony was excluded. The attention of the conductor had been called to a certain paper and he had admitted his signature to it. His testimony concerning it is to the effect that it was filled out by some employee in the office, that he did not read it before he signed it, that he did not know what he was signing, that he supposed that, if he did not sign it, he would lose his position and that that was the reason why he signed it. He also testified that he had no feeling against the railroad company. In another part of his testimony he said: "My recollection of these facts, as I have stated them, is as fresh to-day as though it happened a short while ago. It impressed itself upon my mind. I am positive my testimony is absolutely a correct portrayal of the scene of the accident."

It will thus be noted that all the attempts made by the defendant's counsel were directed to proving contrary statements made at prior times by the conductor and were not directed to proving the true facts in the case.

It is true that a party calling a witness is not precluded from proving the truth of any particular fact material to the issues by any other competent testimony in direct contradiction to what such witness may have testified; and this, not only where it appears that the witness was innocently mistaken, but even where the evidence may collaterally have the effect of showing that he was, generally, unworthy of belief. Gray v. Brooklyn Heights R. R. Co., 72 App. Div. 424, and cases there cited.

And it is equally true that a party who has called a witness may probe his recollection by recalling to his mind a statement claimed to have been previously made and apparently inconsistent with his testimony given on the stand.

But if thereupon the witness, as in the case at bar, adheres to his testimony as given, the party cannot impeach him by the calling of witnesses to impeach his general character or by proof of

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prior contradictory statements by him, nor by a contradiction of the witness by another where the only effect is to impeach and not to give any material evidence upon any issue in the case. Becker v. Koch, 104 N. Y. 394.

That a party who has examined a witness upon a material point in the case cannot impeach his general character as a man is so universally conceded that no citation of authorities is necessary in support thereof.

But the rule that a party cannot show inconsistent statements made by his own witness for the purpose of impeaching him is equally well settled in this State at least.

In Hankinson v. Vantine, 152 N. Y. 20, it was held: "The plaintiff cannot claim that the referee had a right to disregard her (appellant's) evidence upon the ground that she was an interested party because he called her as a witness and proved these facts by her, thereby assuring her credibility as a witness upon that subject. While he might have shown the facts to be different, he could not impeach or deny her credibility," etc.

In Craft v. Brandow, 61 App. Div. 247, the opinion says: "Such a declaration of the witness out of court (referring to his testimony on a hearing before the county judge in supplementary proceedings against another) could not be received as evidence of the fact. It could be pertinent only as an impeachment of the witness' statement as given on the trial. But, having been introduced into the trial as plaintiff's witness he had thereby asserted his credibility and was not in a situation to impeach it. Clearly, there was no error there. Becker v. Koch, 104 N. Y. 394, 401."

In Coulter v. American Merchants' Union Express Co., 56 N. Y. 585, it was even held that a party cannot impeach his own witness either by general evidence or proof of contradictory statements out of court, although such witness was also called as a witness by the adverse party. To the same effect is Nichols v. White, 85 N. Y. 531.

So in Kay v. Metropolitan St. R. Co., 163 N. Y. 447, it was held that where upon cross-examination the plaintiff elicits from opposing witnesses matter not brought out on their direct examination, he makes the witnesses his own as to such new matter, and cannot contradict them in regard to it, since the effect would be to impeach his own witnesses.

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And finally in Fall Brook Coal Co. v. Hewson, 158 N. Y. 150, while it was held that a party, who having called and sworn a witness excuses him before he has been asked any material question, does not make him his witness so as to be precluded from thereafter impeaching his credibility by contradicting him, in case the witness subsequently gives material testimony in behalf of the opposite party, it was also fully conceded and demonstrated that the rule is well settled in this State that a party cannot show inconsistent statements made by his own witness for the purpose of impeaching him. It was further shown that the rule can only be abrogated or modified by statute which has been done in England and some of our sister States, but not in this State. Becker v. Koch, 104 N. Y. 394, contains a statement substantially to the same effect.

In view of these authorities and it clearly appearing in the case at bar that the excluded evidence did not prove or tend to prove the true facts in controversy, but was offered by the defendant for the purpose of impeaching its own witness, no error was committed in the exclusion of the evidence.

Moreover the alleged inconsistent statement and report does not appear in the record, and consequently its materiality cannot be determined even if it were otherwise admissible.

The judgment and order should be affirmed, with costs.

TRUAX and GILDERSLEEVE, JJ., concur.

Judgment and order affirmed, with costs.

WILLIAM B. DUKE et al., Respondents, *v.* PROSPER L. CALUWAERT et al., Appellants.

(Supreme Court, Appellate Term, May, 1903.)

Municipal Court of the city of New York — Removal to City Court — Estoppel — Laches.

Within L. 1901, ch. 466, § 1366 and Code Civ. Pro., § 3216, a defendant waives his right to remove a case from the Municipal to the City Court of the city of New York only by obtaining an adjournment after issue joined; and, accordingly, such right is not lost where the

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defendant obtains, on the return day in the Municipal Court, an adjournment in order to join issue and make a motion to remove and on the adjourned day makes that motion.

Where the plaintiffs subsequently serve a reply entitled in the City Court and in that court demand a bill of particulars they submit themselves to its jurisdiction and are thereafter estopped to move to remand the action to the Municipal Court, and particularly where they wait eight months before making that motion.

APPEAL from an order of the Special Term of the City Court remanding this action to the Municipal Court, eleventh district.

Thomas F. Byrne, for appellants.

Baggott & Ryall (George Ryall, of counsel), for respondents.

FREEDMAN, P. J. The summons, with a copy of the complaint, was personally served on the defendants. On the return day, viz., July 21, 1902, the defendants appeared by attorney and, without being then required to plead, procured an adjournment to July 28, 1902, for the purpose of joining issue and removing the cause. On such adjourned day issue was joined and the cause removed to the City Court. The removal was made by order duly entered and in it the justice who granted the same recited, among other things, that the action is one specified in subdivision 1 of section 1364 of chapter 466 of the Laws of 1901, involving more than $250; that the defendants applied, after issue joined therein and before an adjournment had been granted upon their application, to have said action removed into the City Court; that the defendants had given an undertaking in the sum fixed by him pursuant to the statute; and that such undertaking had been duly approved by him. After such removal and on August 2, 1902, the plaintiffs served a reply entitled in the City Court, and on the same day served a demand for a bill of particulars likewise entitled in the City Court. Eight months afterwards, viz., in March, 1903, without having in the meantime made any objection to the form or sufficiency of either the said undertaking or the said order, the plaintiffs made the motion which resulted in the order appealed from. The order was granted on the ground that the order of

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removal was made after the defendants had asked for and obtained an adjournment, and that it was too late to make such an order, citing 11 Abb. N. C. 124.

The statute in force at the time and under which the defendants were required to proceed was section 1366 of chapter 466 of the Laws of 1901 (commonly called the Greater New York charter as amended), and in addition section 3216 of the Code of Civil Procedure. For the purposes of the present case both sections were substantially alike, and they provided that the defendant may, after issue is joined and before an adjournment has been granted upon his application, apply for an order removing the action to the City Court of the city of New York.

As to the proper construction of this statutory provision to be applied to a case like the one at bar, no authority can be found which is directly in point, as in all reported cases discussing this provision, where the defendant had procured an adjournment or made some motion necessitating such adjournment, issue had previously been joined.

Thus in Dinkel v. Wehle, 11 Abb. N. C. 124, the case relied upon below, the defendant claimed the right of removal after an adjournment had been procured by him, after joinder of issue, and it was held that under section 3216 of the Code it was then too late.

In Ives v. Quinn, 7 Misc. Rep. 660, the defendant, after having interposed a general denial, demanded a bill of particulars which necessitated an adjournment to a future day on which he attempted to remove the cause, and it was held that he was too late, because the demand for a bill of particulars was equivalent to an application for adjournment.

In Enright v. Franklin Publishing Co., 24 Misc. Rep. 180, it was said: "The motion for removal made on the return day of the summons having been withdrawn, and an adjournment of the trial having been granted upon the request of defendant, the latter had then lost its right to a removal of the cause. § 3216, Code Civ. Pro.; Dinkel v. Wehle, 11 Abb. N. C. 124." But presumably the defendant in that case, upon the withdrawal of its first application for removal on the return day of the summons, had interposed an answer and then procured an adjournment of the trial.

Moreover in all these cases the motion to remove was denied.

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In the present case issue had not been joined when the adjournment was had; the adjournment was granted expressly to join issue and remove; upon the adjourned day the motion to remove was made contemporaneously with the filing of the answer; the undertaking met with the approval of the justice and he was satisfied with the application in all other respects, and he thereupon made the order removing the case into the City Court.

Upon full consideration of all these matters I am of the opinion that under the language "after issue is joined *and* before an adjournment has been granted upon his application" a defendant waives his right to removal only by obtaining an adjournment after issue joined. The word "and" is a word of addition and signifies that something is to follow in addition to that which precedes. "And" does not mean "or." The wording of the statute evidently means that, after issue joined, when the opportunity for an early trial is at hand, the defendant must not indicate an intention to go to trial, but must at once take the steps necessary to remove.

The Municipal Court had jurisdiction of the subject-matter of this action and of the persons of the defendants, and the defendants having answered upon the merits and procured the removal of the action into the City Court upon giving the undertaking required by law are estopped to say that the latter court has not jurisdiction of their persons. Vogel v. Banks, 60 App. Div. 459; Matter of Bingham, 127 N. Y. 296.

So the plaintiffs, by serving the reply entitled in the City Court, and a demand for a bill of particulars likewise entitled in that court, submitted to the jurisdiction of said court. Moreover the delay on the part of the plaintiffs of eight months in making the motion to remand, was *laches* and fatal to the motion.

The alleged irregularity in the recitals of the undertaking and the approval thereof can work no different result.

The order appealed from should be reversed, with costs, and the motion to remand denied, with ten dollars costs.

TRUAX and GILDERSLEEVE, JJ., concur.

Order reversed, with costs, and motion denied, with ten dollars costs.

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JAMES GILLICK, Respondent, *v.* HENRY HULL JACKSON et al., Appellants.

(Supreme Court, Appellate Term, May, 1903.)

Trust — Liability of trustees for dangerous condition of their trust real estate — Lighting tenement-house halls in New York city.

Testamentary trustees of an express trust, upon whom as trustees the will imposes the duty of keeping the trust real estate in repair, are liable personally, at least in the first instance, for a failure to do so.

L. 1895, ch. 567, § 9, relative to the artificial lighting of hallways in New York city tenement-houses having no windows opening from the hallways outside of the house, remained in force as to such a house until glass panels had been substituted, under L. 1901, ch. 334, for the wooden panels in the doors at the end of the public halls and opening into rooms, and therefore where a tenant of such a house was injured on July 2, 1901, soon after noon by stumbling over a board in the unlighted public hallway which was so dark that he could not see his way, the court held personally liable trustees who as such had legal title to the house and by the will of their testator were bound to keep it in repair.

APPEAL from a judgment of the City Court, entered on the verdict of a jury, in favor of the plaintiff, and from an order denying defendants' motion for a new trial.

Johnston & Johnston (Edward W. S. Johnston, of counsel), for appellants.

Harrison, Seasongood & Edwards (Wm. H. Leonard Edwards, of counsel), for respondent.

GILDERSLEEVE, J. The action was brought to recover for personal injuries, alleged to have been sustained by plaintiff, on July 2, 1901, in tripping and falling in the hallway of the building No. 201 East Fiftieth street, in this city. It is the claim of the plaintiff that such injuries were caused through the negligence of the defendants, their agents, servants and employees, in

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failing to comply with the provisions of section 9 of chapter 567 of the Laws of 1895, and section 80 of chapter 334 of the Laws of 1901. The complaint alleges also that defendants were, at the time of the said accident, the owners, landlords and lessors of the said building, and that plaintiff was their tenant. The answer admits that the complaint correctly quotes the provisions of the two statutes above referred to, and otherwise denies each and every allegation of the complaint.

The case was tried before the court and a jury, and the issues raised by the pleadings were submitted to the jury, who found a verdict for plaintiff in the sum of $250. The defendants' counsel made a motion for a new trial, which was denied, and from the judgment entered on said verdict and the order denying the motion for a new trial defendants appeal to the Supreme Court.

The evidence, offered on behalf of plaintiff, shows that the building in question was a tenement-house, in which he hired rooms from defendants, who had the management and control of said building as trustees under the will of one Peter A. H. Jackson, deceased; that, on July 2, 1901, plaintiff came home to dinner at about half-past twelve in the afternoon, and found the hallways of the house so dark that he could not see his way to his own flat; that he went along the hallway leading to his flat or rooms, with his hands against the wall, groping his way; that when he came to about the middle of the hall, he stumbled against a board or block, and fell, breaking his right arm at the elbow; that there were no lights of any kind in the hallway, and that there were no outside windows in the said hallway, which was a hallway used in common by all the tenants, and over which the defendants had retained control, and which it was necessary for plaintiff to pass through, in order to enter his flat or rooms. It is further shown that the plaintiff had never found such a board in the hallway before, and he had no reason for suspecting its presence there on the occasion in question. It is also shown that plaintiff was unable to work until November 11, 1902, and even then was obliged to use his left hand in working the railroad switch at which he was employed, and his right arm had not regained its full strength up to the time of the trial of this action. His wages were fifty-two dollars a month, and he was unable to work for four months and nine days. It cannot, therefore, be

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held that the verdict was excessive, if the plaintiff was entitled to recover at all. There is considerable contradictory proof offered by the defendants as to some of the details, but the evidence adduced by the plaintiff was sufficient to sustain the verdict on the disputed matters of fact.

The defendants urge that they are not liable individually, for the reason that they are only trustees under the will of one Jackson, deceased, and as such manage and lease the said building. There is no merit in this contention. So far as plaintiff is concerned, defendants were the owners of the building. Trustees of an express trust in real estate, where the will creating the trust imposes upon the trustees the duty of managing, leasing and keeping in repair the said real property are, by virtue of the legal title which is vested in them, liable personally, at least in the first instance, and not in their representative capacity, for a failure to perform their duties. See Keating v. Stevenson, 21 App. Div. 604, 606, 607. The will of Peter A. H. Jackson, deceased, is in evidence, and by it the duty of keeping the premises in proper condition is imposed on defendants as such trustees. If, therefore, it was the duty of defendants to keep the said hallway properly lighted, and they failed to do so, as found by the jury, they are personally liable for the injuries resulting from their failure to perform their duty in this respect, as the jury, upon sufficient proof, have exonerated plaintiff from the charge of any contributory negligence. See Brown v. Wittner, 43 App. Div. 135.

So far as the lighting of the said hallway is concerned, defendants claim, first, that they were under no obligation to light it; and, second, that, in point of fact, it was sufficiently light. The latter claim is a disputed issue of fact, upon which the jury found against defendants, and with their conclusion we will not interfere.

Section 9 of chapter 567 of the Laws of 1895 provides as follows, viz.: "In every tenement house in said city (of New York), in which there is a hallway or hallways with no window opening from such hallway outside of said house, a light shall be maintained by said owner or lessee in each such hallway between the hours of eight A. M. and ten P. M. of each day unless said hallway shall be otherwise sufficiently lighted." Defendants claim that this law was repealed by chapter 334 of the Laws of 1901. The latter, in section 161, provides that: "All statutes of the state

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and ordinances of the city, *so far as inconsistent with the provisions of this act, are hereby repealed.*" This act went into effect on April 12, 1901, but it provides in section 164 as follows, viz.: "All alterations hereby required upon now existing tenement houses shall be made within one year from the time when this act shall take effect, or at such earlier period as may be fixed by the department charged with the enforcement of this act."

In the act of 1901, the provision of the law of 1895 for lighting the hallways is omitted, but, apparently as a substitute therefor, it provides in section 80 as follows, viz.: "In every now existing tenement house four stories or over in height, whenever a public hall on any floor is not light enough in the daytime to permit a person to read in every part thereof without the aid of artificial light, the wooden panels in the doors located at the ends of the public halls and opening into rooms shall be removed, and ground glass or wire glass panels of an aggregate area of not less than four square feet for each door shall be substituted."

The statute of 1901 does not specifically repeal the act of 1895, but, as we have seen, repeals all acts inconsistent with its own provisions. Inasmuch as the act of 1901 allowed one year from the time it went into effect, *i. e.*, April 12, 1901, in which to make the alterations called for in section 80, defendants' theory seems to be that defendants were not only under no obligation to put in the glass panels before April 12, 1902, but were under no further obligation to keep the hallways lighted between April 12, 1901, and April 12, 1902, for the reason that the act of 1901 repealed the act of 1895, requiring such lighting. We do not agree with this conclusion. Until the glass panels were actually put in the doors, as required by the act of 1901, the provision of the act of 1895, requiring the hallways to be lighted, continued in force. It did not cease to be operative until it became inconsistent with the provisions of the act of 1901, requiring a different manner of lighting the hallways, *i. e.*, by putting glass panels in the doors. Such inconsistency would occur when that other method of lighting was actually put in operation, which was required to be done before April 13, 1902.

The accident, as we have seen, occurred on July 2, 1901, up to which time the glass panels had not been put in the doors, according to the testimony of plaintiff's witnesses who were believed by the jury. As the year from April 12, 1901, had not

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then expired, the law of 1895 was still in effect, so far as this hallway was concerned. The defendants, as found by the jury, did not comply with the requirements of this act, which omission on their part resulted in the injuries which plaintiff has sustained. The defendants are liable in damages for such injuries. Brown v. Wittner, 43 App. Div. 135.

There are a number of exceptions taken by defendants to the rulings and charge of the court, but we do not find any that is of such weight as to require a reversal.

The judgment and order are affirmed, with costs.

FREEDMAN, P. J., and TRUAX, J. concur.

Judgment and order affirmed, with costs.

HENRY SIEFKE et al., as Executors, etc., Appellants, *v.* SIMEON B. MINDEN, Respondent.

(Supreme Court, Appellate Term, May, 1903.)

Action against two joint debtors — Compromise with one and recovery of the balance against the other — Code Civ. Pro., §§ 1942, 1946.

In 1901 the plaintiffs, as executors, sued Weisberg and Minden, as partners, although they had dissolved partnership in 1899, upon a lease, made them as partners by the testator, for rent and water rates payable under it. Minden having applied on the trial to amend his answer and for a stay, the court severed the action on the plaintiffs' motion and they, in Nov. 1902, recovered judgment against Weisberg for $950.81 and in satisfaction and compromise thereof accepted of him $500. The plaintiffs then served a supplemental complaint and demanded and recovered herein, in Dec. 1902, of Minden $450.81, the balance of the judgment. He appealed.

Held, that Weisberg and Minden were joint debtors as well as partners between themselves, and that, within Code Civ. Pro., §§ 1942, 1946, the plaintiffs could compromise with Weisberg without releasing Minden from the residue of the demand or precluding a continuance of the action against him.

That the judgment against Weisberg did not preclude the plaintiffs from compromising.

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APPEAL from an order setting aside a judgment of the City Court of the city of New York.

Francis B. Chedsey, for appellants.

George W. Gibbons (Charles Goldzier, of counsel), for respondent.

GILDERSLEEVE, J. This cause is before us on an appeal from an order of the justice before whom, and a jury, the action was tried in the City Court of the city of New York, setting aside as contrary to law a verdict for the plaintiffs for $483.53 rendered by direction of the court. The action was commenced October 18, 1901, by the plaintiffs against Simeon B. Minden and David Weisberg for rent and water rates under a lease from the plaintiffs' testator to Minden and Weisberg, copartners. The action came on for trial November 13, 1902, when, apparently to avoid delay consequent upon an application by Minden for leave to amend his answer accompanied by a stay of plaintiffs' proceeding, the court, on plaintiffs' motion, ordered that the action be severed, and that it proceed against Weisberg. The cause thereupon took this course, resulting in a judgment against him for $950.81. The plaintiffs accepted from Weisberg $500 in satisfaction of the judgment as to him. The plaintiffs then served an amended and supplemental complaint demanding judgment against Minden for $450.81. The issue raised by the answer of Minden to the amended and supplemental complaint was tried December 17, 1902, and the verdict in question returned by the jury under the direction of the court. At the next term of the court the defendants moved for a reargument of a motion made by the defendant Minden on the coming in of the verdict of the jury, to set aside this verdict and the judgment entered thereon. That motion, on a further consideration of the application, was granted on the ground that the verdict was contrary to law and upon exceptions taken at the trial, and this appeal was taken from the order made thereon. The specific ground for the final decision of the motion, as stated in the opinion of the court, was that the liability of the defendants on the lease to them of the demised premises was joint only, and that the effect of the judgment recovered against Weisberg, one of the defendants, was to extinguish Minden's liability to the plaintiffs for the rent and water rates claimed by

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the plaintiffs to be due from the defendant, and to bar the action against Minden. This ruling is here questioned by the appellants. The respondent argues that if the court below erred in its view of the law, the order is sustainable on the ground that the exceptions taken by the defendant on the trial entitled him to the order. The only exception here insisted upon by the respondent was taken to the admission of testimony claimed to be incompetent, and the effects of which would have been to influence the jury if the defendant had offered proof of his affirmative defenses. But the defendant offered no evidence at all, and merely rested his case on his legal position that the plaintiffs were not entitled to recover, because, as the court afterwards held, the judgment against Weisberg was a bar to any subsequent suit against Minden. The point is taken by the appellants' counsel that there was nothing before the court to show that a judgment against Weisberg was upon the lease or upon any liability which was not a several liability. But in this position he is in error; the amended and supplemental complaint distinctly avers that Weisberg and Minden were both defendants to the action when it was originally brought, and that the cause of action was for rent and water rates payable under the lease. These facts must, therefore, for the purposes of this appeal, be taken as true. The order of severance recites that it was made on motion of the plaintiffs' attorney, and whatever its effect and however erroneous it may be, which we do not intend to pass upon, it certainly was not void, as the court below pronounced it. It was not in the power of the trial justice to sit in review of that order, much less to declare it void; it could be reviewed on appeal only. The justice who made the order severing the action had jurisdiction of the parties and of the subject-matter before him, and his determination could not be questioned, nor set at naught in a collateral proceeding by a judge sitting at *nisi prius*. But, in the view we take of this case, it is not necessary to consider the effect of this order. We think the order setting aside the verdict was erroneous. Weisberg and Minden were, as parties to the lease, joint debtors (Rosenzweig v. McCaffery, 28 Misc. Rep. 485, 59 N. Y. Supp. 863), and as between themselves they were copartners. The latter relation, and the dissolution of the copartnership January 28, 1899, were sufficiently shown by the testimony of Weisberg. The compromise between the plaintiffs and Weisberg took place after

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November 13, 1902, as alleged in the complaint and admitted by the answer. The evidence respecting the existence of a partnership and its dissolution does not amount to a demonstration, but it was sufficient to require the submission of the case to the jury. These facts bring the case within the provisions of sections 1942 and 1946 of the Code. Section 1942 authorizes a creditor to compromise with one joint debtor upon releasing him from the joint obligation, without releasing the other joint debtor, and to compromise with a partner after the dissolution of the copartnership, upon giving him a discharge from all liability, as partner, to the plaintiffs, with the same effect. Section 1946 provides that a partner who has not been joined as a defendant in a suit on a copartnership liability when judgment has been taken against the partner sued, may, if the judgment is unsatisfied, bring a separate suit against the partner omitted. Most, if not all, of the cases bearing on these two sections were instances of actions brought to enforce the entire claim against the joint debtor or partner who was not made a party to the action in which the judgment was recovered; while here, after judgment against Weisberg and a compromise with him, the plaintiffs claim to recover from Minden only the balance due on the judgment over and above the amount paid by Weisberg. Apart from the fact that judgment has been recovered against Weisberg, the act of the plaintiffs in compromising with him was one which, unquestionably, was authorized by sections 1942 and 1946, and the only suggestion of a doubt is whether the plaintiffs' right to compound their claims was affected by the existence of this judgment. This precise question seems, up to the present time, not to have been presented to the courts for determination. As was said in Habeck v. Pupin, 123 N. Y. 115, 119, concerning section 1278, which is closely related to sections 1942 and 1946 in spirit and intent, a narrow and literal construction of a remedial statute intended to abrogate the harsh and technical rule of the common law which frequently operated to defeat a just claim would practically nullify it. Now, considering that Weisberg and Minden were both made defendants in the action as originally brought; that the cause of action against them was for the same debt; that the severance of the action was, in a sense, forced upon the plaintiffs by an exigency in the cause which arose without their fault, and that the plain-

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tiffs claim from Minden only the residue of their demand after deducting the amount paid by Weisberg, we think the plaintiffs' position is quite within the provisions of the Code referred to when so construed as to make them harmonize with the manifest intent of the Legislature. Any attempt to mitigate the severely rigid and technical rule of the common law on the subject of the merger and extinguishment of joint obligations in cases like this, which did not include the abolition of the distinction between a debt in the form of a judgment and one not in judgment, would fall far short of its purpose. The considerations lead to a reversal of the order.

FREEDMAN, P. J., and TRUAX, J. concur.

Order reversed, with costs.

MOSES BERNSTEIN et al., Respondents, *v.* LEVI C. WEIR, as President of the ADAMS EXPRESS Co., Appellant.

(Supreme Court, Appellate Term, May, 1903.)

Express company — Limitation of liability for freight — Failure of shipper to state value — Unexplained loss from ordinary negligence — Knowledge of contents of receipt.

The acts of shippers of freight in filling out, in their own book of the blank freight receipts printed by an express company, a receipt, describing the freight, the consignee and his address, and tendering it at their store to an employee of the company for his signature, is an offer upon their part of a special contract of their own creation and where he signs and returns it to them a special contract results whose conditions bind the principals.

Where the receipt stipulates that the company shall not be liable for damages resulting from certain specified causes unless proved to have resulted from the fraud or gross negligence of the company or its agents and that in any event the holder of the receipt shall not demand beyond the sum of $50, at which sum the property shipped is thereby valued, unless otherwise expressed in the receipt, and the shippers make no statement of the contents or value to the employee and he in their presence stamps the package "Value asked and not

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given", they can recover no more than $50 where the loss of the freight, although unexplained by the express company, resulted from ordinary negligence, unaccompanied by any affirmative wilful act.

It is not material, in the absence of fraud or deception, that the shippers did not know the contents of the receipt — the express company having the right to assume the shippers' assent to the terms of the receipt from their acceptance of it.

The rule in "freight cases" distinguished from the rule in "baggage cases".

APPEAL by the defendant from a judgment in favor of the plaintiffs for $153.13 damages, besides costs rendered in the Municipal Court, fifth district, borough of Manhattan.

Guthrie, Cravath & Henderson (Carl A. De Gersdorff, Richard Reid Rogers, and William M. Coleman, of counsel), for appellant.

Morris Meyers, for respondents.

FREEDMAN, P. J. The plaintiffs, at their place of business, delivered to the Adams Express Company a package of silk to be forwarded to a firm in Philadelphia. The express company did not deliver the goods, nor is it able to account for them, although it made due effort to locate them. The plaintiffs had judgment for the full amount claimed, notwithstanding the limitation of liability specified in the receipt given, and from that judgment this appeal is taken.

There are two distinct lines of decisions in this State relating to the legal effect which may be given to a receipt issued by a common carrier for goods shipped, which may be respectively termed the baggage cases and the freight cases. Much unnecessary confusion is caused by the arguments of counsel presented in the endeavor to make the one line of decisions apply to the facts of a particular case which in reality should be governed by the other. The distinction depends upon whether the circumstances, under which the receipt is issued, are such that the court will say that the minds of the parties met in the agreement embraced in its terms so that the receipt constitutes the contract between the parties.

In Magnin v. Dinsmore, 56 N. Y. 168, 171, it was said: "It

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is no longer open to question, in this State, that in the absence of fraud or imposition, the rights of carrier and shipper are controlled by a contract, in writing, delivered to the shipper by the carrier, at the time of the receipt of property for transportation."

On the last appeal in that celebrated case (70 N. Y. 410) the rule was reiterated with great emphasis as follows: "It would be trifling with contracts deliberately made by shippers, and the decisions of our courts, and saying in effect that they could not, by any contract, limit or restrict their common-law liability to hold that by calling ordinary neglect, from which loss ensues, a 'misfeasance' or 'an abandonment of the character of carriers' the limitation was nullified, and the full common-law liability established. The act which will deprive the carrier of the benefit of a contract for a limited liability fairly made must be an affirmative act of wrong doing, not merely ordinary neglect in the course of the bailment. It need not necessarily be intentional wrongdoing, but the mere omission of ordinary care in the safe keeping and carriage of the goods is not the misfeasance intended by the authorities."

In the case at bar the plaintiffs had in their possession at their store a book containing Adams Express Company's freight receipts. When the goods were shipped they tendered to the company's employee one of the receipts contained in this book, which they had filled out with the consignee's name and address and a description of the article shipped, and requested his signature, and the said employee signed the same. Nothing was said as to the terms of the freight receipt or as to the contents or value of the package. But the employee of the express company, in the presence of the plaintiffs' representative, stamped the receipt with the words "Value asked and not given," and, so stamped, the receipt was delivered to and retained by the plaintiffs.

The freight receipt, signed under these circumstances, bore conspicuously upon its face, over the signature, a contract containing the following provisions: "It is part of the consideration of this contract, and it is agreed that the said Express Company are forwarders only, and are not to be held liable or responsible for any loss or damage * * * arising from the danger of Railroads, Ocean or River Navigation, Steam, Fire

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in Stores, Depots, or in Transit, Leakage, Breakage, or from whatever cause, unless in every case the same be proved to have occurred from the fraud or gross negligence of said Express Company, or their servants; nor, in any event, shall the holder hereof demand beyond the sum of $50.00, at which the above property forwarded is hereby valued, unless otherwise herein expressed or unless specially insured by them and so specified in this receipt, which insurance shall constitute the limit of the liability of the Adams Express Company."

In view of these facts and circumstances it must be held that when the blank receipt was filled up by the plaintiffs at their own office, and the receipt, as thus prepared, was thereafter, namely at the time of the delivery of the merchandise for transportation, presented by the plaintiffs to the employee of the express company for signature, it instituted a proposal on the part of the plaintiffs for a special contract which was wholly of their own creation. And as every person is presumed to intend that which is the ordinary and natural consequence of his own proposed act, it must further be held, that when the express company assented to such proposal by signing the same and redelivering it to the plaintiffs, the proposal ripened into a special contract, and as such it became binding upon both parties. Falkenau v. Fargo, 35 N. Y. Super. Ct. 332; affd., 55 N. Y. 642.

In Belger v. Dinsmore, 51 N. Y. 166–172 (where the contract was identical with the one in the present case) the court said: "In the case under review, the plaintiff's wife received the instrument as evidence of the fact that the property was delivered by her for transportation as freight, and not merely as the ordinary baggage of a passenger; and the learned judge, in that opinion, fully recognizes the rule, that a person, receiving a bill of lading on the delivery of property to a carrier for transportation in the ordinary and usual course of business, knows that it is a contract containing the terms and conditions upon which it is to be carried, and he, by the acceptance of it, assents to those terms and conditions."

The plaintiffs contend, however, that these authorities should not control as against them, because they and their clerks testified, and the judge below must be deemed to have found it a fact, that the receipt in question was one out of a book of

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receipts given to them by the defendant as receipts; that the contents of said receipts had never been called to their attention; that they had never read the same; and that they did not know that each of said receipts contained a contract. This testimony should not be believed. On his cross-examination Morris Bernstein, one of the plaintiffs, made the following admission, viz.: "I have been in business in New York in this line about ten years, but have only been engaged in business requiring the shipment of goods outside this city for about one year. I ship on the average four or five packages every month by express."

But independently of that the plaintiffs are precluded from denying knowledge. In Falkenau v. Fargo, *supra,* it was said: "In regard to the provisions of that contract plaintiffs cannot be permitted to plead ignorance." And in Kirkland v. Dinsmore, 62 N. Y. 171, 178, it was held: "It is true that a contract implies an assent to its terms by the contracting parties, but a party may assent expressly or by implication. (Byles, J., Van Tall v. South Eastern Railway Co., 104 Eng. Com. Law 75.) He cannot escape from the terms of a contract, in the absence of fraud or imposition, because he negligently omitted to read it, and when the other party has a right to infer his assent, he will be precluded from denying it to the other's injury. The plaintiff is we think in that position. The contract was one which the parties might lawfully make. The defendant had a right to infer from the plaintiff's acceptance of the receipt without dissent, that he assented to its terms, and now after a loss has occurred it is too late to object that he is not bound." The case last cited has been followed in Germania Fire Ins. Co. v. M. & C. R. R. Co., 72 N. Y. 90, and Hill v. Syracuse, B. & N. Y. R. R. Co., 73 id. 351, 353.

In Zimmer v. N. Y. C. & H. R. R. R. Co., 137 N. Y. 460, 463, Judge Gray said, in a case where the principal attempted to show that he was not aware of the terms of a receipt signed by his agent: "That the plaintiff did not know of the terms of this contract, is of no consequence. Coolidge was his agent, and will be presumed to have known and to have assented to the stipulation in the contract, which limited the general liability of the carrier. Belger v. Dinsmore, 51 N. Y. 166; Steers v. Steamship Co., 57 id. 1. That presumption always holds good, unless some fraud, or deception, is practiced, which was

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not the fact in this case. There can be no question about the reasonableness of such a contract. It is based upon the consideration of a rate of transportation, far below what it would have been, if the carrier had assumed all the risks. It was entered into with full opportunity for ascertaining its terms, and it was incumbent upon the shipper, or owner, to acquaint himself with them, and if he has not done so, he will, nevertheless, be held chargeable with their knowledge. Cases where parties proposing to have articles of property transported by a common carrier, deliberately enter into some necessary contract relating to the transportation, differ materially from those cases of travelers who commit their trunks, or articles of baggage, to an agent of some express or transfer company, and receive at the moment some paper, which, as it has been said, amounts simply to a voucher enabling them to follow and identify their property."

The concluding sentence of the last citation shows clearly the distinction drawn by the court between cases of shipments of merchandise made in the ordinary course of business where ample opportunity is given to the shipper to learn the terms of the shipping contract or bill of lading, and the "baggage cases" where a traveller receives something in the nature of a check or voucher for his baggage, usually under circumstances where he is offered no choice but to take whatever is given him, and no opportunity to observe that it is in form a contract.

For the reasons stated the case of Springer v. Westcott, 166 N. Y. 117, and the other so-called "baggage cases" relied upon by the attorney for the plaintiffs may be at once disregarded.

Having now demonstrated that under the circumstances of this case the receipt in question constituted a contract binding upon both parties, it remains to be seen whether the terms of the contract are such that they will be effective to limit the liability of the carrier to the amount specified in the contract in a case where, owing to the carrier's inability to explain the loss, it will be presumed to have been due to his negligence.

Upon this point the plaintiffs claim that, even if the receipt was a contract binding upon the parties, it did not apply to a loss due to an unexplained cause which is presumed to have been due to the defendant's negligence or breach of its duty as carrier, and in support of this contention they rely upon the

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recent cases of Simon v. Dunlap's Express Co., 38 Misc. Rep. 775, 776, and Blum v. Monahan, 36 id. 179, which, it is claimed, have changed or modified the law with respect to the limitation of liability. But the fact is otherwise. Those cases were both decided against the carrier on the sole ground that the language of the particular contract used in each case did not in terms cover a loss by negligence. The courts have always held that, when a carrier wishes to relieve himself from liability for his own negligence, he must do so in apt language which will clearly convey to the shippers the intention of the carrier. But even that rule has been somewhat modified. The case of Magnin v. Dinsmore, above cited, which the Court of Appeals, at first distinguished from Belger v. Dinsmore, upon the ground that the language of the contract was not such as to relieve the carrier from a loss by negligence, went to the Court of Appeals four times, and the final result was that the court sustained the limitation of liability upon the ground that, notwithstanding there was no express reference to loss by negligence, the shipper, having failed to state the value of the goods when shipped, could not recover more than the amount fixed by the contract as the limit of recovery where no such value was stated. The court said (62 N. Y. 35, 40, 44): "Where there is no special contract limiting the common-law liability of the carrier, nor any notice so specially brought home to the knowledge of the shipper as to have that effect, the shipper is not bound to disclose the value of the goods, unless he is asked thereof by the carrier; but the carrier (for proper reasons, Crouch v. L. & N. W. Railway Co., 14 C. B. 255), has a right to make inquiry and to have a true answer, and if he is deceived by a false answer given, he will not be responsible for any loss. If, however, the carrier makes no inquiry, and no artifice is used to mislead him, he is responsible for loss, however great may be the value. * * * Where there is a special contract limiting liability, or other thing tantamount thereto it is otherwise. * * * When the shipper agrees with the carrier for a limited liability, he thereby expresses to the latter his estimate of the risk to be run and of the care needed, and 'holds out the package to him as an ordinary article, which he would have no objection to take as of course.' The carrier is thereby put off his guard. * * * Accepting carriage upon the terms of a limited lia-

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bility, the shipper indicates his judgment of the degree of risk and of needed care; and his silence as to real value is the same as an assertion of mean value, thus keeping from the carrier his adequate reward; and, what is worse, misleading him as to the degree of care and security which he should provide. * * * . Silence only as to value amounted to such an imposition upon the defendant, as would relieve it from a liability for the total value of the goods, unless something more in its conduct is shown than negligence to carry safely and deliver promptly." On the fourth appeal (70 N. Y. 410, 415) the court said: "The stringent rule of liability which the common law applies to common carriers is founded upon well-considered reasons of public policy, but it may be modified and limited by special contract fairly made. The common law is not so unjust or unreasonable as to put the common carrier beyond the pale of law, so that he cannot rely upon the contract and good faith of shippers of merchandise with whom he deals. * * * The disclosure of the value of the goods was a condition precedent to the attaching of any liability to the carrier for mere ordinary neglect unaccompanied with any misfeasance or wilfull act."

Moreover the sufficiency of the contract now under consideration has already been passed upon by the Court of Appeals. In Belger v. Dinsmore, 51 N. Y. 166, 173, the terms of the freight receipt were identical with those of the receipt of this case. There was no valuation of the property which was proved to be worth $467. The trial court excluded proof of negligence on the part of the express company on the ground that the receipt constituted a contract, by the express terms of which the defendant was excused from all liability, whether for negligence or otherwise, except as therein stated. This ruling was sustained by the Court of Appeals. The court said (p. 172): "The instrument relied on as evidence of the contract, as has already been stated, does not merely acknowledge the delivery and receipt of the property in question to the express company for transportation, but, in connection therewith, it is declared to be a part of the terms and conditions on which it was received that the company was not to be responsible for loss and damages resulting from certain specified causes, unless proved to have occurred from fraud or gross negligence of the company or its agents;

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and that the holder thereof should not, in any event, demand beyond the sum of fifty dollars, fixed as the value of the article to be carried, unless otherwise expressed. A party, accepting such an instrument, as has already been shown, declares his assent by such acceptance, to those terms and conditions. They thereby become obligatory on both parties, and prescribe their mutual rights and obligations."

It, therefore, appears that there has been a direct adjudication by the Court of Appeals upon the precise form of receipt which is now before the court in a case against the same company where the loss was due to an unexplained cause. To the same effect is Toy v. Long Island R. R. Co., 26 Misc. Rep. 792, and the doctrine of the Belger case has been approved in Steers v. Steamship Company, 57 N. Y. 1; Magnin v. Dinsmore, 62 id. 35; 70 id. 410. Indeed in every reported case where this identical form of contract has been considered, it has been sustained as effective to limit the liability of the company to the agreed valuation. In the recent case of Rowan v. Wells, Fargo & Co., 80 App. Div. 31, it was even held that where the receipt issued by an express company provides that it shall not be liable "for an amount exceeding $50 on any shipment unless its true value is herein stated," and the value of the package was not given by the shipper, and if it had been, an additional charge would have been made for its transportation, and special care would have been exercised for its safekeeping, the express company is not liable in excess of $50, unless the shipper proves some affirmative act of wrongdoing on its part, and that proof of mere ordinary neglect is not sufficient." Magnin v. Dinsmore, 70 N. Y. 410, as already shown, laid down the same rule; and so did Ghormley v. Dinsmore, 53 N. Y. Super. Ct. 36.

All the material facts in the case at bar having been agreed upon, the judgment appealed from should, for the reasons above stated, be modified by reducing the amount to fifty dollars, and, as so modified, affirmed, with costs of the appeal to the defendant, an offer of judgment for that amount having been duly filed.

TRUAX and GILDERSLEEVE, JJ., concur.

Judgment modified by reducing amount to fifty dollars, and as so modified, affirmed, with costs, to defendant.

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MEMORANDA

OF

CAUSES NOT REPORTED IN FULL.

SUPREME COURT, APPELLATE TERM, MARCH, 1903.

WILLIAM MAN, as Trustee, Etc., Respondent, *v.* EDWARD A. KATZ, Appellant.

APPEAL from a judgment of the Trial Term of the City Court of the city of New York, entered upon a verdict directed by the court.

Stern, Singer & Barr (Bert Cohen, of counsel), for appellant.

Frederick H. Man (Henry H. Man, of counsel), for respondent.

GILDERSLEEVE, J. It appears from the evidence and admissions of counsel that plaintiff leased a building to the Elmer Parlor Furniture Company, for a term of ten months from July 1, 1902, at a rental of $208.33 a month, payable in advance. This corporation made an assignment for the benefit of creditors, to the defendant, who took the lease, along with other effects of the assignor, and continued in the use and occupation of the building. When the rent for October, 1902, became due, defendant failed to pay it, and plaintiff sued him individually for the rent. The case was tried in the Trial Term of the City Court, and the justice directed a verdict for plaintiff. The defendant put in no evidence, and the facts are practically undisputed. The defendant appeals, and the only question raised on the appeal is as to the individual liability of the defendant, who took the lease, as we have seen, as assignee for the benefit of creditors of the lessee, the said corporation.

We are of the opinion that the rule laid down in Walton v. Stafford, 14 App. Div. 312; affd., 162 N. Y. 563, must control

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the disposition of this appeal. The plaintiff there was an assignee for the benefit of creditors. The assignor was the lessee of certain premises and the assignee accepted the lease as an asset of the assigned estate and utilized the demised premises for the benefit of his *cestui que trust*. It was there held that the lease became a part of the assigned estate, held by the assignee, in his trust capacity, subject to the covenants contained therein. While it was so held, the assignee, in his representative capacity, was chargeable with all the conditions attached thereto. It was not his contract, either personal or as representative, and his liability upon the covenants was consequently not contractual. The liability was the liability of his assignor's estate, legally resulting from its acquisition of the lease as an asset. It was, therefore, the assignee's liability as assignee.

A distinction must be drawn between contracts of an assignor that pass into the hands of an assignee and contracts made by him as assignee in his administrative capacity. The latter creates contractual relations and may be enforced against him personally. The former is a liability of the assignor's estate and cannot be enforced against the assignee individually.

Applying this doctrine to the case at bar the conclusion is that the plaintiff could have brought the action against defendant as assignee, and not against him in his individual capacity.

The judgment is reversed, and a new trial granted, with costs to the appellant to abide the event.

FREEDMAN, P. J., concurs.

GIEGERICH, J. (concurring). The action is brought against the defendant individually to recover rents of certain premises known as No. 376 Broome street, in the borough of Manhattan, city of New York. The defendant is the assignee for the benefit of creditors of the Elmer Parlor Furniture Company. The assignment to him was made on the 19th day of September, 1902, at which time his assignor was occupying the premises under a lease for a term of ten months beginning July 1, 1902, at a monthly rental of $208.33, payable in advance on the first day of each month. The defendant duly qualified as such assignee, accepted the lease, and entered into the possession of the premises, which he continued to occupy until dispossessed on or about the 29th day of October, 1902, for nonpayment of rent. This action was then begun against him individually to recover the

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October rent. No evidence was presented in behalf of the defendant, and upon the facts above stated a verdict was directed for the plaintiff, and from the judgment entered thereon this appeal is taken.

The respondent relies on the general principle that expenses incurred by one acting in a representative capacity can be collected by suit against him individually and only by such suit. Ferrin v. Myrick, 41 N. Y. 315; Darling v. Powell, 20 Misc. Rep. 240, and Schmittler v. Simon, 101 N. Y. 554, are cited as supporting this rule in the case of executors; New v. Nicoll, 73 N. Y. 127; Mulrein v. Smillie, 25 App. Div. 135, and Blewitt v. Olin, 14 Daly, 351, in the case of trustees; and Draper v. Salisbury, 11 Misc. Rep. 573, in the case of an assignee for the benefit of creditors.

The defendant, however, points to the case of Walton v. Stafford, 14 App. Div. 310, where, at page 312, it is said that if an assignee finds that the lease is a valuable asset he can accept it, and that "Upon its acceptance it became a part of the assigned estate, held by the assignee in his trust capacity subject to the covenants contained therein. While it was so held the asignee, in his representative capacity, was chargeable with all the conditions attached thereto. It was not his contract, either personal or as representative, and his liability upon the covenants was, consequently, not contractual. That liability was the liability of his assignor's estate, legally resulting from its acquisition of the lease as an asset. It was, therefore, the plaintiff's liability *as assignee.*"

This, I think, must be taken as overruling the decision made in Draper v. Salisbury, 11 Misc. Rep. 573, that the assignee is liable personally.

Such being the law, the trial court clearly erred in directing a verdict in favor of the plaintiff.

I am, therefore, of the opinion that the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

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CHARLES MINNERS and HENRY MINNERS, Respondents, *v.* MARIA T. SMITH, Appellant.

APPEAL from a judgment of the General Term of the City Court of the city of New York, affirming a judgment of the Trial Term, entered on the verdict of a jury, and an order of the Trial Term denying defendant's motion for a new trial.

J. E. Chandler, for appellant.

J. I. Wiener, for respondents.

GILDERSLEEVE, J. The plaintiffs were copartners, carrying on a grocery business. The complaint is for a balance due for goods sold and delivered to the defendant. The answer is a general denial. The jury found for the plaintiffs. The defendant appealed to the General Term of the City Court, where the judgment and order were affirmed. From the judgment of affirmance the defendant appeals to the Supreme Court.

The plaintiffs' witnesses testified that the account was opened by the defendant and the credit given to her personally, and that the goods were ordered by her and delivered at her residence, and that the balance claimed has not been paid. Defendant's husband swore that he opened the account with plaintiffs; that his wife was an invalid and that, as a general rule, he or his daughter ordered the articles. It is conceded that defendant was a married woman; that the plaintiffs were aware of that fact; that the goods so delivered were for the use of the family of defendant; and that the majority of the plaintiffs' bills were paid by checks signed by the husband of defendant.

The defendant made no motion to dismiss the complaint, and made no motion for the direction of a verdict in her favor. The justice charged the jury not to consider the fact that the defendant was a married woman, but simply to decide the disputed question of fact whether or not the goods were ordered by defendant and delivered to her by plaintiffs, and have not been paid for. No exception was taken to the body of the charge, but the defendant's counsel asked the court to charge as follows, viz.: Defendant's counsel: "It appearing in evidence that the defendant is the wife of Mr. Smith, and that these goods were furnished to the family, I would like to have you charge the

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jury, as a presumption of law, that whatever Mrs. Smith (the defendant), did in the purchase of these goods, she did for her husband, upon her husband's suggestion." The Court: "No, sir; I decline to charge as requested, because, as I have said before, if you intended to plead that, you should have done it in your answer." To this refusal defendant's counsel duly excepted.

The failure of the defendant to make a motion to dismiss the complaint was an admission that there was a question of fact for the jury. See Greenspan v. Newman, 37 Misc. Rep. 784, 76 N. Y. Supp. 894; Hopkins v. Clark, 158 N. Y. 299. As the jury found for the plaintiffs, we are compelled to accept as correct the contention of the plaintiffs that the account was opened by the defendant; that the credit was given to her; that the goods were ordered by her and delivered at her residence and have not been paid for.

When the jury returned with a verdict for plaintiffs, defendant's counsel said: "I make a motion for a new trial on all the grounds enumerated in section 999 of the Code, and on the additional ground that, under the law, the husband is liable for necessaries supplied to his family, and that the burden in this case was upon the plaintiffs to establish, by a preponderance of proof, that she had made herself individually liable, and took it out of the statute, in other words, made an individual contract which the law presumes to exist." The Court: "That would have been possible, it is true, if you had pleaded it in your answer; but your answer is simply a denial that the plaintiffs sold to the defendant in this action." The motion was denied, and defendant's counsel duly excepted. The main question urged upon this appeal is the following, viz.: Under a general denial of the allegations of the complaint, that the goods were sold and delivered to defendant, can the defendant avail herself of the defense that she was a married woman, and that the goods, mentioned in the complaint, were necessaries ordered for her family, for which her husband should have been held liable? We are of the opinion that this question must be answered in the negative. Such defense should have been set up in the answer. See Frecking v. Rolland, 53 N. Y. 422.

It may further be observed that, as the finding of the jury compels us to accept as a fact that defendant individually contracted with the plaintiffs and opened the account on her own behalf, and that the credit was given to her personally, her liability is not affected by the fact that she was a married woman; for even

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where the defendant is a married woman, and has no separate estate, and is engaged in no separate business, the plaintiffs are not thereby prevented from recovering for goods purchased by her upon her individual credit. See Crisfield v. Banks, 24 Hun, 159.

There are no exceptions in the case which require discussion.

The judgment of the General Term is affirmed, with costs.

FREEDMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs.

MICHAEL ROSENKRANZ, Appellant, *v.* ROSE SABERSKI, Respondent.

APPEAL by the plaintiff from affirmance by the General Term of the City Court of the city of New York, of a judgment entered upon the direction of the court at Trial Term, in favor of the defendant.

Abraham B. Schleimer, for appellant.

Bienenfeld & Avrutis, for respondent.

GIEGERICH, J. The action is to recover damages for the conversion of a marble soda-water fountain. The answer is a general denial.

It appears from the evidence, adduced on behalf of the plaintiff, that the apparatus in suit, belonging to the plaintiff, and bearing his name stamped upon it, was, in accordance with the plaintiff's business practice, delivered to a customer named Cohen, to be used by him. Cohen subsequently moved away, leaving the fountain in the possession of the defendant, who refused to surrender it to the plaintiff upon his demand, saying, "I cannot give it to you because the man that gave me the key of the door said that everything around in the store belongs to me; I have to sell the apparatus — not to give it to you;" that thereafter the plaintiff again demanded of her the apparatus or its value, whereupon she said, "I sold the apparatus; I have not got it any more, and I will pay you after a couple of days, and you come, and I will pay you the money for the apparatus."

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The defendant did not take the stand, but her husband and son did. They both denied that she had been upon the premises in question at any of the times mentioned by the plaintiff, and the son testified that the apparatus was "still there for the rightful owner" and that he was "ready to give it to Mr. Cohen."

At the close of the entire case the defendant moved for direction of a verdict in her favor, which was granted, notwithstanding the plaintiff's request that there be submitted to the jury the following issues of fact, viz.: "Whether or not the defendant had sold the apparatus which is mentioned in the complaint and appropriated the proceeds to her own use, and secondly, whether she has converted that apparatus, after due demand was made upon her."

The learned General Term, in its opinion affirming the judgment, states: "The record shows a preponderance of proof on the part of the defendant as well as a failure on the part of the plaintiff to substantiate his alleged cause of action, and the application for direction of a verdict for the defendant was properly granted."

The plaintiff, a verdict having been directed, is entitled to the most favorable inferences deducible from the evidence, and all disputed facts are to be treated as established in his favor. McDonald v. Metropolitan St. R. Co., 167 N. Y. 66, 68.

Testing his evidence by this rule, it is clear that he proved all the essential requisites of an action for conversion.

The learned General Term adverts to the fact that there was no privity of ownership between Cohen and the defendant, but that circumstance cannot defeat the plaintiff's right of action, the defendant having exercised a dominion over the property in suit and deprived the plaintiff of its use. 26 Am. & Eng. Encyc. of Law, 714; O. J. Gude Co. v. Farley, 25 Misc. Rep. 502.

There was, as thus appears, no failure of proof on the part of the plaintiff, but even if he had failed to prove his case, and ought to have been nonsuited, the defendant was not entitled to have a verdict directed in her favor, which would be a final bar to the plaintiff's right of action. Briggs v. Waldon, 83 N. Y. 582, 586; Baylie Tr. Pr. (2d ed.) 324.

The trial justice likewise erred in taking the case from the jury upon the ground that the evidence prepondered in favor of the defendant. Assuming, without deciding, such to be the fact, the record, nevertheless, discloses, as we have seen, a conflict of testimony upon material questions of fact, which was

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for the jury, and not for the court, to determine, and hence the direction of a verdict was not warranted. Schillinger v. McGarry, 25 Misc. Rep. 745; Chambers v. Goldklang, 31 id. 247; McDonald v. Metropolitan St. R. Co., *supra*. As was said by the court in the last-cited case (p. 70): "Whenever a plaintiff has established facts or circumstances which would justify a finding in his favor, the right to have the issue of fact determined by a jury continues, and the case must ultimately be submitted to it."

There were other points urged by the appellant's counsel, but they may be presented upon another trial and need not be passed upon.

The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

FREEDMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

ALLEN P. HALLETT, Respondent, *v.* THE AMERICAN LAW BOOK CO., Appellant.

APPEAL by the defendant from an order of the City Court of the city of New York, at Special Term, allowing to plaintiff a discovery and inspection and permission to make copies of certain manuscripts in the defendant's possession.

Fred. Cyrus Leubuscher, for appellant.

Archibald Robinson Watson, for respondent.

GIEGERICH, J. The plaintiff has been engaged for six years last past as a writer of articles for law publications, and in that capacity was engaged by the defendant for one year at a salary of $2,400. Before this term had expired he was discharged and now brings this action, alleging that such discharge was wrongful. The defendant company, among other defenses, claims that it had to reject much of the work submitted by him, because it was "utterly worthless and unfit for publication" in that it omitted cases adjudicated in certain specified years, and cited cases not

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in point, and otherwise erroneously cited cases, etc., and that the defendant was obliged to have some of the articles rewritten *ab initio* by others. By reason of these, and other circumstances alleged in the answer, a counterclaim for $1,200 is set up.

The plaintiff asserts in the moving affidavit that the articles were well and carefully prepared, that they were not defective and faulty in citation as alleged, but were published substantially as submitted by him with certain transpositions and disguises awkwardly made, and certain additions ignorantly made.

Several formal objections are first urged by the appellant, but I do not find any force in any of them.

The petition was not subscribed by the petitioner, it is true, but by his attorney. It was, however, verified by him, which is the important thing, and which has been held to be enough, even though the petition is not signed by any one. Chadwick v. Spargur, 1 Civ. Pro. 423.

A previous demand was not necessary where an order to show cause has been served and opposed on the return day. Albany Brass & Iron Co. v. Hoffman, 12 Misc. Rep. 167; affd., 86 Hun, 620.

The order fixes a date and "such other times as the said referee may appoint." This, we think, is a compliance with rule 16 of the General Rules of Practice, and less likely, in a case like this, to work hardship to either side than an attempt to prescribe a definite period.

It is further contended that an inspection is not necessary before trial. In view, however, of the great number of pages, over 3,000, and the character of the manuscript, containing many citations of authorities as it does, it seems clear that a previous and deliberate examination is necessary, and that an examination upon the trial would be wholly inadequate.

It is also claimed that the manuscripts now "contain peculiar classifications, annotations and markings" which are the defendant's trade secrets, and which it is sought by this proceeding to discover for the benefit of a rival in business into whose employment the plaintiff entered after his discharge by the defendant. So far as classifications are concerned, all those must be shown in the articles in suit which have now been published in the defendant's volumes so far issued. Any annotations or markings may be erased or covered, or the matter can be otherwise controlled by the referee, so that the plaintiff shall obtain the inspection he is entitled to with as little damage to the defendant as possible.

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It should be borne in mind in this connection, however, that the defendant has put in issue the character of the manuscript, and has made it necessary for the plaintiff to examine and copy it to safely prepare for trial. If the defendant has inscribed any of its trade secrets on the manuscript, that too was its own act.

We are not convinced that the application is made in bad faith, as alleged, and in the interests of the defendant's rival. On the contrary, it seems a natural and necessary course for the plaintiff to pursue in the case.

The order should be affirmed, with ten dollars costs and disbursements.

FREEDMAN, P. J., and GILDERSLEEVE, J., concur.

Order affirmed, with ten dollars costs and disbursements.

EDWARD LEECH, Respondent, *v.* THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO., Appellant.

APPEAL by the defendant from a judgment rendered in favor of the plaintiff, in the Municipal Court of the city of New York, first district, borough of Manhattan.

Henry W. Taft (Hugh A. Bayne, of counsel), for appellant.

Thomas P. Hall, for respondent.

FREEDMAN, P. J. Plaintiff brought this action to recover the value of six boxes of fish sent to him from Boston, and sold by defendant under the following circumstances:

Ten boxes of fish, packed in ice, were shipped at Boston on April 7, 1902, over defendant's road and consigned to plaintiff in this city. The shipment reached here on the morning of April 8, 1902, and the defendant immediately notified the plaintiff of its arrival, and notified him that "it is imperatively necessary that all freight be taken away the same day of its arrival." This notice plaintiff received between nine and ten A. M. of April eighth. The goods not having been removed on April ninth, and it being observed that the ice in the boxes was loose, that the fish were giving out an odor indicating that they were be-

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coming stale and that a slimy fluid was flowing from the boxes, the defendant sent a second notice to the plaintiff to call and get the fish. No attention was paid to this notice, and on the morning of the tenth of April, the state of the fish having been reported to the proper officer of the defendant, he, about three thirty P. M. of that day, directed that the fish be sent to S. B. Miller & Co., fish dealers, at Fulton Market, with orders to sell the same at the best price obtainable. One load, containing six boxes of fish, were thereupon taken by a truckman, not in the employ of the defendant, and conveyed to said Miller & Co.'s place of busisness. About one hour after the six boxes had been taken the plaintiff, for the first time, appeared, by a Mr. Smith, his representative, and demanded his goods. Smith was told that the six boxes had been sent to Miller & Co. to be sold, and that the sale had not yet taken place, and he could have the six boxes by paying three dollars, the truckman's charge, for taking them from defendant's pier to Miller & Co.'s market. Smith offered to pay the freight on the ten boxes from Boston, but refused to pay the three dollars' cartage charges. Thereupon, Wolf, defendant's agent, telephoned to Miller & Co. to sell. The four remaining boxes Smith took away, paying the freight thereon. As the market for the sale of fish was over before Miller & Co. were finally ordered to sell, they held the fish until the following morning at which time they sold them in open market for twenty-nine dollars and sixty-five cents. The cartage was three dollars, and cost for selling, three dollars and seventy-one cents, and the freight charges on the six boxes, nine dollars, making the total charges, fifteen dollars and seventy-one cents, leaving the net proceeds, thirteen dollars and ninety-four cents, for which the defendant acknowledges liability. Plaintiff had a judgment for sixty-four dollars and fifty cents, the amount testified to by the plaintiff as the reasonable value of the six boxes sued for.

Appellant claims that the sale so made by its direction was justifiable, for the reason that having an interest in the property sold by virtue of a lien as carrier, and that if the freight had perished its lien would have become valueless, that, therefore, under the circumstances it was warranted in protecting itself from loss. It also claims it is protected by statute. Chapter 582, Laws 1899, amending section 46 of the Railroad Law, provides as follows: "Unclaimed live stock and perishable freight or baggage may be sold by any such railroad or other transportation

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company without notice, as soon as it can be, upon the best terms that can be obtained. All moneys arising from the sale of such unclaimed live stock, perishable freight or baggage, after deducting therefrom all charges and expenses for transportation, storage, keeping, commissions for selling the property, and any amount previously paid for its loss or non-delivery, shall be deposited by the corporation making such sale with a report thereof, and proof that the property was live stock or perishable freight, with the comptroller for the benefit of the general fund of the state, and shall be held by him in trust for reclaimation by the person or persons entitled to receive the same."

Without discussing the first point raised by the appellant it is sufficient to say that we think that the defendant has fully complied with the provisions of the foregoing act. At the time it removed the six boxes of fish it had been in possession of the railroad for four days, viz.: April seventh, the day they were shipped, to April tenth, inclusive; and fifty-four hours of this time was after their arrival at their destination and before defendant took any action regarding their disposal. The plaintiff had been notified of their arrival and had ample opportunity to remove the fish, but had given no indication of an intention to accept them. Under these circumstances the defendant had a right, on April tenth, to consider them as unclaimed. "Unclaimed" in the statute can mean nothing but "unclaimed within a reasonable time after notice" (Hedges v. Hudson R. R. Co., 49 N. Y. 223), and what is a reasonable time must be determined by the circumstances attending each case. Plaintiff's counsel conceded on the trial that never before had more than two days elapsed between the arrival and delivery of fish. The defendant, in estimating what was a reasonable time, had a right to consider the fact that the goods were perishable. That fish, placed in boxes, packed in ice and shipped long distances in railroad cars are perishable freight is a fact of such common knowledge as to need no judicial utterance for its establishment. In the case at bar the evidence of the perishable nature of the consignment, on April ninth and tenth, was unmistakable. The time that had elapsed since shipment, the absence of ice, the odor emanating from the boxes, the leaking of the slimy fluid, all gave strong indications of decay, and was notice to the defendant that prompt action was necessary, and justified it in taking the course it followed. The plaintiff knew that a sale of the six boxes had been directed and knew where the goods were to be sold.

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He could have protected himself from a loss of but three dollars cartage and the expenses of sale by attending such sale and purchasing the property, and at the same time have preserved his legal rights.

The defendant was bound to sell "upon the best terms that can be obtained." It sent the fish to the principal market of the city, to a large and well-known dealer, instructed him to sell at the best price he could, and they were sold in open market at the highest price possible. This was a compliance with the terms of the act. The material facts in the case being undisputed, the questions arising are those of law only.

The judgment must be modified by reducing the amount of the recovery in the court below to the sum of thirteen dollars and ninety-four cents and costs, and as modified affirmed, without costs to either party on this appeal.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment modified by reducing amount of recovery in court below to thirteen dollars and ninety-four cents and costs, and as modified affirmed, without costs.

Matter of Summary Proceedings Brought by the EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, as Landlord, Respondent, *v.* OSCAR O. SCHUM, as Tenant, Appellant.

APPEAL by the tenant from a final order entered in the Municipal Court of the city of New York, eleventh district, borough of Manhattan, upon a verdict directed in favor of the landlord upon the trial.

Sackett & McQuaid, for appellant.

Alexander & Colby, for respondent.

FREEDMAN, P. J. This was a proceeding brought under the statute to remove the defendant as tenant from premises No. 2295 Eighth avenue for holding over without permission of the landlord after his term had expired.

The tenant offers three reasons for the reversal of the order in this case, viz., that the petition is defective in that it does not

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sufficiently set forth the title or interest of the landlord in the premises; that an agreement for hiring offered by the landlord and admitted in evidence by the court was improperly received and that the direction of a verdict was error.

The petition was made by one Erastus Hamilton, who swore therein that he was "the agent in respect to the premises hereinafter described, of the Equitable Life Assurance Society of the United States, who are the owners and landlords of the following premises." This sufficiently sets forth the facts necessary to confer jurisdiction upon the court. The written agreement referred to was not signed by the landlord, but was signed by the tenant. The landlord elected to treat it as a lease. The tenant took possession of the premises under said agreement and cannot now question its validity. McAdam Landl. & Ten. (3d ed.) 127. The testimony offered on the part of the tenant, to the effect that the tenancy was not a tenancy for one year, but from month to month, was received under objection and was improper, as it was an attempt to vary the terms of a written instrument by parol and such testimony had no legal effect.

At the close of the whole case there was no legal competent evidence contradicting the testimony given on the part of the landlord, consequently there was no issue of fact to be submitted to the jury; neither did the tenant object or except to a direction of a verdict in favor of the landlord.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Final order affirmed, with costs.

JUAN S. SOLIS, Respondent, *v.* VINCENTE BALBAS et al., Appellants.

APPEAL by the defendants from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, tenth district, borough of Manhattan.

Douglas A. Levien, for appellants.

Alexander La Mont, for respondent.

FREEDMAN, P. J. The pleadings in this case were oral. The plaintiff charged conversion by the defendants as copartners of

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property alleged to have been purchased by him from defendants, consisting of fixtures, cigars, etc. The answer was a general denial. One of the grounds set up by the appellants for a reversal of the judgment is the refusal of the trial justice to permit the defendants to file an undertaking and remove the trial of the action to the City Court under the provisions of section 1366 of the Greater New York charter.

The facts regarding the application made by the defendants for such removal are as follows:

The return day of the summons herein was June 20, 1902. Issue was joined that day by the defendants interposing an answer to the complaint and at the same time demanding that the plaintiff furnish a bill of particulars. The defendants also then and there offered an undertaking as provided by said section for the approval of the court. The plaintiff's attorney asked for an adjournment, but before doing so moved that the application of the defendants for a removal be denied, upon the ground that the demand for a bill of particulars made by the defendants deprived them of their right to remove said action. This motion seems to have been denied and June 25, 1902, at plaintiff's office, was the time and place fixed for the sureties to appear and justify. The case was adjourned by the court until June twenty-seventh for approval of the undertaking. The defendants' attorney on the day set for the justification asked plaintiff's attorney to consent to the substitution of a new undertaking, and had two sureties present, one of them being other than one of those first offered, stating his inability to procure the attendance of one of the former sureties.

The plaintiff's attorney refused to accept a new undertaking and on June twenty-seventh the parties again appeared in court, and the defendants' attorney again offered an undertaking with two sureties then and there present ready and willing to justify. The justice refused to allow a new undertaking to be filed, and upon application of plaintiff's attorney or upon its own motion set the case down for trial on June 30, 1902. The defendants' attorney then applied for and obtained an order to show cause, returnable in Part I of the Supreme Court, why a mandamus should not issue commanding the justice to permit said sureties to justify, and if found sufficient to approve the same. This order was accompanied by a stay of proceedings in the Municipal Court until the hearing and determination of the motion. This motion not having been disposed of at the time the case was set down for trial, viz.: June thirtieth, it was again adjourned by the court until July

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ninth, defendants being absent at said adjournment and having no knowledge of it. Upon the hearing of the motion for the writ of mandamus it was denied without costs upon the ground that "said undertaking is not sufficient in that it does not state any amount in which the sureties are bound or in whose behalf the undertaking was given." No objection based upon these grounds had been urged in the Municipal Court.

The case came up on July 9, 1902, and the defendants again tendered an undertaking, and having their sureties present asked the court to allow them to justify and to have the case removed to the City Court, if such bond should be approved, and this was again denied by the court. The respondent's attorney in his brief claims that the only question to be considered upon this appeal is as to whether or not the justice erred in refusing to accept the undertakings offered and to make an order removing this action to the City Court.

Section 1366 provides that "the defendant in an action * * * where the damages claimed * * * as stated in the complaint, exceeds the sum of two hundred and fifty dollars, may, after issue is joined and *before an adjournment has been granted upon his application,* apply to the justice," etc.

It is substantially conceded herein that no adjournment has ever been had upon the application of the defendants, unless the demand for a bill of particulars made by them at the joinder of issue must be regarded as such an application. It has been held that a motion made by a party desiring a removal which necessitates an adjournment is equivalent to an application for an adjournment. Ives v. Quinn, 7 Misc. Rep. 660, 661; Dinkel v. Wehle, 11 Abb. N. C. 124. In Ives v. Quinn, *supra,* the undertaking was offered after the adjournment and upon the opening of the trial, and although the defendant disputed that he had asked for an adjournment, the court said: "The inference is obvious that his demand for a bill of particulars caused the adjournment."

In Dinkel v. Wehle, *supra,* the defendant had applied for and obtained an adjournment and on the adjourned day presented his undertaking. Neither of these cases present the same state of facts as in the case at bar. In this case it cannot be assumed that the demand for a bill of particulars necessitated an adjournment. None of the adjournments had were in consequence of such demand.

The bill of particulars was filed at once after demand therefor and upon the day of the joining of issue. The first adjournment

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was had for the purpose of allowing the sureties to justify. All the other adjournments were had, either upon the court's own motion or upon the application of the plaintiff. So that down to July ninth, the day set for trial, none of the adjournments had been granted upon the defendants' application nor by reason of their demand for a bill of particulars. The intent of section 1366 (*supra*), is to compel the defendant to promptly elect, and such election must be made at the joinder of issue and before an adjournment upon the defendant's application has been had, in which forum his case shall be tried, and thus prevent the plaintiff being put to the necessity of, possibly after several preparations for trial being met with a removal of the action to another court. This intent of the statute was fully observed by the defendants. They gave prompt notice of their intention to remove the case and proffered their undertaking and undoubtedly the sureties would have justified on the first day they had offered, had the plaintiff not obtained an adjournment to enable them to justify at a future date, and from the day of joinder of issue to the day of trial were persistently endeavoring to obtain from the court a justification of their sureties. By the ruling of the court they were deprived of a substantial right and nowhere does it appear that they ever waived such right or lost the same by reason of any fault on their part. Had the defendants' demand for a bill of particulars as aforesaid necessitated an adjournment to enable the plaintiff to comply therewith and had one been taken in pursuance of such demand and an application for the removal of the cause been made thereafter a different situation would have presented itself. As the foregoing requires a reversal of the judgment none of the other grounds urged for reversal of the judgment need be considered.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellants to abide event.

HARRIS GLASS, Respondent, *v.* PETER HAUSER, Appellant.

APPEAL by the defendant from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, fifth district, borough of Manhattan.

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Charles Firestone, for appellant.

Sanders & Feltenstein, for respondent.

GILDERSLEEVE, J. The pleadings are oral. The complaint is for "damages for breach of contract," and the answer is a "general denial, and demand for bill of particulars." The plaintiff furnished a bill of particulars, setting forth that on September 20, 1901, the plaintiff stored with defendant certain specified merchandise; that plaintiff subsequently demanded the return of said goods, but defendant refused to deliver the same; and that the value of the goods was the sum of $363.05. On the trial, the plaintiff proved the storage of the goods, the demand and the refusal, and offered some evidence tending to show the value of the articles stored. The defendant, on the other hand, proved that in the case of Weissman v. Hauser, the goods in question were replevied by a marshal, and copies of the summons, affidavit, undertaking and requisition were served upon defendant by the marshal, who, however, left the goods with defendant, but took a receipt therefor. This is sufficient to constitute a valid levy by the marshal. See Marshall v. Friend, 33 Misc. Rep. 447. None of the exhibits is attached to the record, but the above statement of facts appears to be conceded by counsel for the respective parties. The rule is that a bailee for reward may excuse himself for a failure to deliver the property to the bailor, when called upon to do so, by showing that the property was taken from his custody or control under the authority of valid legal process, and that, within a reasonable time, he gave notice of the fact to the owner. See Roberts v. Stuyvesant Safe Deposit Co., 123 N. Y. 61, 65.

A former judgment in the case at bar was reversed by this court on the ground that defendant had not shown that the process was legal or when the seizure was made or the plaintiff apprised. Glass v. Hauser, 38 Misc. Rep. 780.

On the appeal before us the validity of the process does not appear to be questioned, and the defendant and the marshal testify as to the service of the papers and the levy, which is alleged to have taken place on September 30, 1901. The defendant swears that he was unable to locate the plaintiff, although he used reasonable efforts to do so, but that he did notify the brother of plaintiff who called on the day of the levy, and that he tried to learn from the brother the plaintiff's address, and showed the brother the

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papers in the replevin action that had been served on him. The brother denies that he showed him the papers, or tried to learn plaintiff's address. The defendant also says that he tried to find plaintiff's address in the directory, but could not. The brother of plaintiff swears that he called with five dollars, and demanded the goods, and that defendant's manager told him that "the goods were out," but said nothing about replevin proceedings. There is considerable dispute between the witnesses for the respective parties as to many questions of fact. The justice found for the plaintiff in the sum of two hundred and sixty-five dollars and five cents damages, and twenty dollars and fifteen cents costs.

As we have said, the exhibits are not annexed to the record, but it is, apparently, conceded that the process was a valid and legal one. It is claimed by plaintiff, however, that defendant was not released from liability, under his contract of storage, for the reason that he gave no notice to the plaintiff of the manner in which the goods were taken, so as to enable the plaintiff to assert his rights to the property in question. The defendant, as we have seen, claims he notified plaintiff's brother, who seems to have represented plaintiff in the storage matter, on the same day that the levy was made in the replevin action. This is denied by the brother. It is not denied, however, that defendant looked in the directory and endeavored to locate the plaintiff for the purpose of notifying him. The issue the trial justice had to decide turned upon this proposition, viz.: Did the defendant, under the circumstances, take the necessary precautions and make such reasonable efforts to advise the bailor of the seizure, by legal process, as to exonerate him from liability?

We think there is a strong preponderance of evidence in support of the defendant's claim that he did. The finding of the court below on this question must be said to be against the weight of evidence. The record as we have seen, is very imperfect by reason of the absence of all exhibits. It seems to be conceded that the warehouse receipt is in the name of "E. Glass," and that no address appears upon it. The suit was brought in the name of Ezrael Glass, and remained in that name until the second trial, when the name of the claimant of the property appeared to be "Harris Glass," and the court then ordered the name in the summons to be changed from "Ezrael" to "Harris." In the plaintiff's notice of settlement of the case herein on appeal the plaintiff is put down as "Israel Glass." This is also true of the bill of particulars. There is little wonder that, in the absence of any

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address on the warehouse receipt, which was given, in the name of and to one "E. Glass," that efforts did not result, in unearthing the real claimant of the property, to wit, "Harris Glass," and apprise him of the replevin proceedings.

We think that, under the circumstances established by the testimony here, the defendant did all that could reasonably be expected of him to inform the plaintiff of the seizure of the goods by the marshal in the Weissman action. The judgment must be reversed and a new trial ordered, with costs to appellant to abide the event.

FREEDMAN, P. J., and GIEGERICH, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

JOSEPH ROCK, Respondent, *v.* THE INTERURBAN STREET RAILWAY CO., Appellant.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, fourth district, borough of Manhattan.

Arthur K. Wing, for appellant.

Wilson Lee Cannon, Jr., for respondent.

GILDERSLEEVE, J. The plaintiff's van was injured by defendant's car. The plaintiff sued for the damages caused thereby. The case was tried before the justice, with a jury. Several witnesses were called on each side, and the jury found in favor of the plaintiff in the sum of $249, the whole amount for which the action was brought. Defendant appeals.

The judgment is assailed on two alleged errors of the trial justice: (1) For not dismissing the complaint on the ground of improper and inadequate proof of damages. (2) In instructing the jury that if they found a verdict for the plaintiff at all, it could only be in the amount of $249. The evidence as to the amount of the damage sustained was as follows, viz.: Plaintiff testified in detail what injuries the van suffered. He then goes on to state, "The van cost when new $669. I took it to Nelson, the man who made it. At time of accident it was like new. I had it brand new in January of this year. I only had it a

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couple of months." Nelson testified that he had built many vans, and knew what it costs to repair them; that plaintiff brought the van to him to be repaired; that he itemized what was the matter with the van, and what it would cost to repair it. "Q. Did you overhaul it yourself? A. Yes, sir, myself. Q. Have you the items of the injury to the van and what it would cost to repair it? A. Yes, sir. Q. Please read it to the jury. A. Two new side panels, $80; one new bottom frame piece, $8; one standard, $1.50; setting one axle, $3.00; two new spokes, 70 cents; setting one door, $1.00; setting one spring, $3.50; repairing and refitting brake, $4.00; painting, $60; pictures, $100. 118 feet of gold lettering, $59. That is all. Q. What is the total cost of repairing it? A. $320.70. By the Court. Q. What was the total cost of repairing the van? A. $320.70." Defendant made a motion to dismiss on the ground, among others, that "the damages have been inadequately and insufficiently proven." The motion was denied, and defendant excepted.

In his charge to the jury, the court said: "Of course, if you find a verdict for the plaintiff at all, it can only be in the amount of $249. * * * so that, if you find that the plaintiff was not guilty of any negligence that contributed to the accident, and if the defendant was guilty of negligence, which caused the accident, you will find a verdict for the plaintiff for $249." Defendant excepted to that portion of the charge wherein the court said that the verdict could be only in the amount of $249.

It will be observed by a careful reading of the testimony, that only the cost is given, and there is no statement or evidence that such cost represented the reasonable worth of the necessary repair.

The justice manifestly took the cost of repairing, $320, to be the damage proved, and this being a sum in excess of the amount demanded in the complaint, he instructed the jury as we have seen, that, if they found for plaintiff, their verdict should be in the sum of $249, which was the limit fixed by the complaint. In the absence of evidence that the repairs were necessary and reasonably worth the sum paid, it was error to hold that the sum paid could be recovered, up to the limit allowed by the demand in the complaint. See Gumb v. Twenty-third St. R. R. Co., 114 N. Y. 414; Lynch v. Kluber, 20 Misc. Rep. 603; Volkmar v. Third Ave. R. R. Co., 28 id. 141; Schimpf v. Sliter, 64 Hun, 466. Moreover, had the proof as to the amount of damages been adequate the exact amount to be awarded was entirely and exclusively one for the jury.

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The judgment must be reversed, and a new trial granted, with costs to appellant to abide the event.

FREEDMAN, P. J., and GIEGERICH, J., concur.

Judgment reversed and new trial granted, with costs to appellant to abide event.

ADOLPH SAND, Appellant, *v.* JOHN ROSENAGEL, Respondent.

APPEAL from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, fourth district, borough of Manhattan.

Abraham B. Schleimer, for appellant.

No appearance for respondent.

GILDERSLEEVE, J. There is a sharp conflict as to the facts in the case at bar. It is conceded, however, that plaintiff stored with defendant certain chattels on April 4, 1900, for which defendant delivered a warehouse receipt, which provided that "if at any time there shall be due and unpaid the storage fees for twelve months, then the proprietor of the storage-rooms is authorized and empowered to sell, at public auction, a sufficient amount of the goods to pay the storage due at that time, without further notice."

The plaintiff swears the value of the property so stored was five hundred dollars; that at the expiration of a year from said 4th day of April, 1900, he called on defendant, asked for his goods and offered to pay the amount of the storage due, but that defendant replied that he had sold the chattels and offered plaintiff three dollars, as the surplus realized after the payment of the dues, which offer plaintiff refused, and made a formal demand for the return of his chattels; that he, plaintiff, never received any notice of an intention of defendant to sell the property; that he never authorized the sale, and, upon defendant's refusal to return the property, this action was brought.

Defendant, on the other hand, swears that he moved part of the plaintiff's chattels to Coney Island, for which plaintiff agreed to pay him ten dollars, but neglected to pay the same; that the

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rent of the chattels were stored with him by plaintiff on April 4, 1900; that nothing was paid thereon for storage; that at the expiration of a year he notified plaintiff to pay, or he would sell, unless paid; that plaintiff called and pleaded poverty, and defendant consented to wait a little longer; that he waited nearly three months, and again notified plaintiff that he would sell unless paid; and that, upon plaintiff's failure to pay, he advertised the goods for sale and sold them at public auction for forty-one dollars; that, although plaintiff still owed him five dollars, he offered to give plaintiff three dollars as a surplus after payment of the charges due.

Upon the sharp dispute of testimony thus presented, the justice found for defendant.

We regard his decision as final, so far as the facts of the case are concerned. There remains, however, a question of law to be discussed.

The defendant admits that the notice to plaintiff was a verbal one, on one occasion, and a letter, sent by his servant, on another occasion, in which letter defendant "simply told him that his goods were run out and asked him what he was going to do." Defendant also states that the sale was advertised in the *New York Journal* only, and in response to the question, "This advertisement was published how many times in the *Journal*?" he replied "one week." He was then asked, "One whole week?" To which he replied, "Yes, sir." He states that, in response to the said letter, plaintiff came to see him. So far, therefore, as the notice of an intention to sell was concerned, the only notice that plaintiff received was a verbal one from defendant personally. The defendant does not state the date of the advertisement of sale in the *New York Journal*, nor show how near in point of time it came to the date of sale.

Section 73 of the Lien Law (Laws of 1899, chap. 369), provides that a warehouseman has a lien on the goods stored. Section 80 provides for a sale of the goods to satisfy the lien. Section 81 provides that notice of sale shall be given to the owner, which notice shall contain a statement of the following facts, viz.: (1) The nature of the debt or agreement under which the lien arose, with an itemized statement of the claim and the time when due; (2) A brief description of the personal property against which the lien exists; (3) The estimated value of such property; (4) The amount of such lien, at the date of the notice. It shall also require such owner, on or before a specified day, not less

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than ten days from the service thereof, to pay the amount of such lien, and shall state the time when and place where such property will be sold, if such amount is not paid. This notice shall be verified by the lienor to the effect that the lien upon such property is valid, that the debt upon which such lien is founded is due and has not been paid and that the facts stated in such notice are true to the best of his knowledge and belief. Section 82 provides that the sale shall be advertised once a week for two successive weeks, and that such sale shall be held not less than fifteen days from the first publication.

It will be seen, therefore, that the testimony of defendant fails to show a compliance on his part with the requirements of the statute. It is true that the warehouse receipt provided that if plaintiff did not pay the fees for twelve months, the defendant could sell the property at public auction, without further notice. Even assuming that this can be construed as a waiver by plaintiff of notice to him, the fact remains that the warehouseman, by his own testimony, shows that the notice was not published "once a week for two successive weeks," but for "one whole week," which was not a strict compliance with the statute. Whether or not the sale was fifteen days from the first publication of the advertisement does not appear, as we have already stated.

The statute prescribes a certain method of procedure to be followed by a warehouseman in enforcing his lien by sale, and the latter cannot be relieved from the requirements of the statute by an arbitrary insertion in the warehouse receipt of a waiver of notice on the part of the owner.

For the reasons above stated the judgment must be reversed, and a new trial ordered, with costs to abide the event.

FREEDMAN, P. J., and GIEGERICH, J., concur.

Judgment reversed and new trial ordered, with costs to abide event.

NATHAN SCHEUER et al., Appellants, *v.* MAURICE L. MONASH, Respondent.

APPEAL by the plaintiffs from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, ninth district, borough of Manhattan.

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Jay C. Guggenheimer, for appellants.

Max D. Steuer, for respondent.

GILDERSLEEVE, J. The plaintiffs sued for $201.13, being made up of $185, money loaned, and $16.13, goods sold and delivered. The defendant admitted receipt of $185 in money and $16.13 in goods, but alleged that this sum of $185 was money paid on account of $500 which plaintiffs owed defendant for a *bonus*, under a certain contract of employment, and defendant counterclaimed for $298.87, the difference between the $500 *bonus* and the $201.13, so paid by plaintiffs. The defendant claims that on or about October 15, 1899, the parties entered into a parole contract, by which defendant was to work for plaintiffs from January 1, 1900, to December 31, 1900, for a certain weekly salary, a stated commission and a *bonus* of $500 in case defendant's sales, during said year, amounted to over $20,000. There is a considerable conflict of evidence, and the justice submitted to the jury the disputed questions of fact. The jury found for the defendant for the whole amount claimed. Plaintiffs appeal.

The case has been tried three times and has twice been passed on by this court. The law of the case is, therefore, well settled. On the first appeal (see 35 Misc. Rep. 276) the following principles were laid down, viz.: "The invalidity of a contract for services by its terms *not* to be performed within a year is not available to the master to defeat a recovery by the servant of his agreed compensation where he has been permitted to perform and has performed the conditions imposed upon him. In such case the void contract may afford a measure of the value of the services. Where however the servant performs services for only ten months of the stipulated term of one year and then abandons without the master's consent, he cannot recover under the contract, nor does his stipulated yearly salary afford a measure of the value of his services for ten months." In that case the judgment had been for defendant, and this court reversed the same, and ordered a new trial. On the second trial the defendant also got judgment, which this court reversed on the ground that, as defendant had not amended the answer, by setting up a waiver on the part of plaintiffs of their right to defendant's services for the whole year, he could not prove such waiver on the trial. See 37 Misc. Rep. 803.

On the third trial the defendant was allowed, on terms, to

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amend the answer by setting up the waiver and the termination of the contract by mutual consent. Under the contract plaintiffs were entitled to defendant's services for the whole year. At the end of the tenth month, according to the testimony of the defendant, the contract was terminated by mutual consent, and the plaintiffs waived their right to defendant's services for the remaining two months of the year. The rule is that when the parties mutually terminate a contract of employment before the expiration of its term, the said contract becomes fully executed, notwithstanding it has, by its original terms, a longer period to run. Jeffery v. Walker, 72 Hun, 631. The testimony of the defendant, which was accepted as true by the jury, shows that, at the end of the said tenth month, when the contract was so terminated by mutual consent, defendant's sales already amounted to over $20,000, and that, therefore, his *bonus* was already earned.

The appellants attack the judgment on the grounds, (1) that there was a breach of contract, because defendant left the employment of the plaintiffs before the expiration of the year; (2) that the amendment of the answer was not sufficiently broad to permit proof of waiver and of a termination of the contract by mutual consent; (3) that the imposition of forty dollars' costs, as a condition of the amendment, was insufficient; (4) that the contract was void under the Statute of Frauds; and (5) that the verdict was against the evidence.

None of these grounds would warrant a reversal of the judgment.

There was, as we have seen, a termination of the contract, by mutual consent, at the end of the tenth month, when defendant had already earned his *bonus*. There was no breach of contract by defendant, for the reason that plaintiffs waived their right to further services from defendant.

The amended answer sufficiently sets up this termination and waiver. Pleadings must be liberally construed, especially in actions in the Municipal Court, where they are frequently oral.

The costs imposed were well within the discretion of the trial justice, and were accepted by plaintiffs, who proceeded with the trial. It is true that plaintiffs excepted to the ruling of the justice, but this exception does not call for a reversal.

The Statute of Frauds does not apply. The contract was terminated by mutual consent before the expiration of the year. The defendant was permitted to perform, and did perform, all

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the conditions required of him by the contract, except that of continuing to work for plaintiffs during the last two months of the contract term, from the performance of which condition he was excused, as we have seen, by the waiver of the plaintiffs. See Scheuer v. Monash, *supra;* Jeffery v. Walker, *supra.*

There is sufficient evidence to sustain the verdict.

The judgment is affirmed, with costs.

FREEDMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs.

ROCCO GALLETTO, Appellant, *v.* ALBERTO SERAFINO, Respondent.

APPEAL by the landlord from a final order of the justice of the Municipal Court of the city of New York, second district, borough of Manhattan, made in summary proceedings to dispossess.

Rosario Maggio, for appellant.

Jay C. Guggenheimer, for respondent.

GIEGERICH, J. The dismissal of the present proceeding is sought to be upheld upon the ground that a former proceeding between the same parties and for the same cause was dismissed upon the merits.

An examination of the record of such former proceeding shows, however, that the landlord's counsel vainly endeavored upon the trial to prove by his client the allegations of the petition, and regarding his answers to questions put to him as unsatisfactory, moved for a postponement of the trial in these words, "Will your honor kindly adjourn this case to another day, so that I can properly instruct him what to say?" This remarkable request, which the justice characterized as "outrageous," was properly denied, whereupon the landlord rested and the proceedings were dismissed, without a motion having been previously made therefor.

The final order in such proceeding does not recite that it was rendered upon the merits, and a careful scrutiny of the record fails to disclose anything from which it might even be inferred that it was so, but, on the contrary, shows clearly that the dismissal was solely for failure of proof.

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But even if the order purported to be upon the merits it would not alter the situation, since the landlord was merely nonsuited at the close of his case. Thiry v. Taylor Brewing & Malting Co., 37 App. Div. 391. As was said by the court in the case just cited (p. 393): "The granting of a motion for a nonsuit is simply a determination that, upon the evidence then presented, the plaintiff has not shown himself entitled to any relief, but its effect goes no further than that. It is not a determination that the plaintiff may not be entitled to relief in another action based upon the same right, if he is able to produce sufficient evidence to establish his claim. It amounts simply to an adjudication that in the particular case, upon the facts which are made to appear on the evidence, the plaintiff is not entitled to recover, and it goes no further than that."

The dismissal of the proceedings under review was unwarranted and the final order should be reversed and a new trial ordered, with costs to the appellant to abide the event.

FREEDMAN, P. J., and GILDERSLEEVE, J., concur.

Final order reversed and new trial ordered, with costs to appellant to abide event.

THE NATIONAL PARK BANK OF NEW YORK, Respondent, *v.* THE AMERICAN EXCHANGE NATIONAL BANK, Appellant.

APPEAL from a judgment of the Municipal Court of the city of New York, second district, borough of Manhattan, in favor of the plaintiff.

Butler, Notman, Joline & Mynderse (William H. Fain and Lewis H. Freedman, of counsel), for appellant.

Louis F. Doyle, for respondent.

GIEGERICH, J. The action was brought to recover two sums of forty dollars each, being the respective amounts of two checks, one to the order of the Lincoln Insurance & Banking Company, and the other to the order of the Commercial Fire Insurance Company, paid by the plaintiff to the defendant through the clearing-house

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upon indorsements alleged to have been fraudulent or unauthorized. The indorsement in each case took the following form — first the name of the corporation stamped across the back of the check, then the written words "Rothschild & Co. Agts." followed by the written signature "Henry Y. Miller" and finally these words stamped on, "Pay Mechanics' Trust Company or order, Henry Y. Miller." The question is whether Miller had authority to make the first two indorsements.

Evidence on behalf of the plaintiff was offered in the form of depositions taken without the State. The deposition of Jacob Rothschild showed that the firm of Rothschild & Co., doing business in Philadelphia, and of which he was a member, was the general agent of both the insurance companies in question, the one a corporation of Indiana and the other of Delaware; that this firm issued the policies and collected the premiums thereon for both companies, under a written authority the terms of which he refused to disclose on the ground that it was of a private nature; that his firm had authorized no one except one Charles C. Block to indorse the firm name or the name of either corporation on any checks made payable to the respective corporations; that he had one partner, James R. Wilson; that Henry Y. Miller "bore no relation whatever" to him or to his firm or to either corporation. The evidence contained in the other depositions need not now be referred to.

Miller, called on behalf of the defendant, testified that he was a partner in the firm of Rothschild & Wilson; that the copartnership business was the control of insurance companies; that the firm owned both the corporations in question, which had no assets, and the officers of which were their clerks; that he represented the companies in New York and New Jersey; that twenty-five per cent. of the premiums received was paid to canvassers and brokers and for expenses, and the balance, after paying losses, was divided between him and Rothschild and Wilson; that he collected the premiums on the policies issued by or through him, indorsed such premium checks, put them through his bank and, after paying the commissions and other expenses, gave or sent the balance to Rothschild.

There was also put in evidence a letter from Rothschild & Co. to C. S. Atkinson & Co. of New York, dated June 13, 1901, more than a month before the transactions in suit, returning a check to the order of the Commercial Fire Insurance Company, with

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emphatic directions to send it to Miller, through whom the policy in payment of the premium on which the check was given had been obtained. Rothschild claimed that this was done as a mere matter of bookkeeping so that Miller's account could be more easily kept, and that the check should have later been forwarded by Miller to his firm, whereas Miller testified that this was only in the regular course of their dealing, and a single transaction of a thousand where he had received and indorsed and put through his own bank such checks. This check, which bore indorsements similar to one of those in suit, was offered in evidence but excluded on the objection that it was immaterial and irrelevant. Other similar attempts were made to put in evidence facts that would tend to show an authority in Miller to make such indorsements by reason of an established course of dealing.

Miller's claim that he was a partner in the firm was corroborated by the testimony of three apparently disinterested witnesses, attorneys of this city, who testified that Rothschild admitted in their presence and Miller's that the latter was his partner.

In view of Miller's charge that the corporations were mere forms or names through which Rothschild & Co. did business, and the refusal of Jacob Rothschild to make full disclosure of the relations existing between the firm and these companies on the ground that such relations were of a "private nature," and of his sweeping denial that Miller "bore any relation whatever" to him or his firm, or to either of the companies, although the undisputed facts show that he certainly did bear an important relation, and in view of the corroboration Miller received from different sources, I am constrained to take a contrary view of the weight of evidence from that of the justice below.

Since a new trial must be had, it may be of some service to point out that though the exact extent of the authority of Rothschild & Co. is not disclosed, still it is shown that they had power to authorize others to indorse checks with the companies' names, as in the case of Block, testified to by Rothschild. That being the fact, such authority could be conferred upon Miller by a long course of dealing, as well as by express permission. Marine Bank v. Clements, 31 N. Y. 33; Hammond v. Varian, 54 id. 398. It will, therefore, be proper and desirable, the testimony being so conflicting, that upon the new trial a full exposition be made of the established course of business between Miller and Rothschild & Co. and the companies, if they exist in a proper sense, and he had any dealings with them.

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The judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE, J., concurs; FREEDMAN, P. J., taking no part.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

SUPREME COURT, APPELLATE TERM, MAY, 1903.

EDWARD HATFIELD, Appellant, *v.* ARTHUR F. MCGINNISS, Respondent.

APPEAL by plaintiff from an order of the General Term of the City Court of the city of New York, striking out the eighth paragraph of his complaint.

J. Philip Berg, for appellant.

Isaac & Jacob Fromme (Jacob Fromme, of counsel), for respondent.

FREEDMAN, P. J. The action is brought to recover damages alleged to have been sustained by the plaintiff by reason of the loss of the services of his wife and of expenses incurred for medical attendance upon her after personal injuries inflicted upon said wife through the negligence of the defendant. The eighth paragraph of the complaint averred that in another action the wife, after a trial upon the merits, recovered a judgment against the defendant for her personal damages and that no appeal was ever taken from said judgment. This paragraph was properly stricken out. The rule is that a judgment in one action cannot be given in evidence on the trial of another, unless the parties are the same, or there is a privity of blood, representation, estate or law between one of the parties to it and the persons against whom it is sought to be introduced. Against such parties or privies it is then received on the principle of estoppel, to which it is essential that it should be mutual. Booth v. Powers, 56 N. Y. 22.

In the case at bar the plaintiff was not a party to the wife's suit, nor is he privy to the wife in any of the respects above mentioned. Neeson v. City of Troy, 29 Hun, 173.

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So it has been held that a judgment concludes a party only in the character in which he was sued and that a judgment recovered by a mother, as guardian *ad litem* for her infant son, against the defendant in behalf of her son for injuries sustained by him through the negligence of the defendant, was not admissible in evidence against the defendant in another action brought by the mother for the recovery of damages sustained by her in the loss of the services of her infant son, occasioned by the same injuries suffered through the same accident. Furlong v. Banta, 80 Hun, 248. To the same effect are Gerstein v. Fisher, 12 Misc. Rep. 211; Malsky v. Schumacher, 7 id. 8.

The case of Anderson v. Third Ave. R. R. Co., 9 Daly, 487, upon which plaintiff relies, has been disregarded and practically overruled. Malsky v. Schumacher, 7 Misc. Rep. 8; Gerstein v. Fisher, 14 id. 644.

The recent case of Cahnmann v. Metropolitan St. R. Co., 37 Misc. Rep. 475, does not help the plaintiff, because in that case both the plaintiff and the defendant had been parties to the prior action, and hence the fact that there was an additional party plaintiff in the second action was held not material.

The case of Gray v. Brooklyn Heights R. R. Co., 72 App. Div. 454, has also no application to the question at bar because in that case the action of the husband and the action of the wife were tried at the same time before the same jury and submitted together upon the same evidence.

The order appealed from should be affirmed, with costs.

Truax and Gildersleeve, JJ., concur.

Order affirmed, with costs.

Lucius A. Wilson, Respondent, *v.* Louis B. Lange, Appellant.

Appeal from an order of the City Court of the city of New York, made at Special Term, denying a motion to vacate and set aside an order made by a judge of said court directing service of the summons in this action by publication or without the State.

Evarts, Tracy & Sherman (George E. Cogswell, of counsel), for appellant.

Howland, Murray & Prentice (Herbert S. Barnes, of counsel) for respondent.

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FREEDMAN, P. J. The plaintiff's attorney upon the summons and complaint herein and the affidavit of the plaintiff obtained an order from a judge of the City Court directing service of the summons in this action be made by publication, etc., or by personal service of the same and a copy of the complaint and of the order without the city of New York. A motion made at Special Term to vacate said order was denied and from that denial this appeal is taken. Section 3170 of the Code of Civil Procedure contains the provisions relative to granting an order of publication in the City Court and so far as it is material to the question on this appeal, it reads as follows: "An order directing service of the summons without the city of New York or by publication may be granted by the court or a judge thereof but only in case where a warrant of attachment has been issued, * * * the plaintiff when he applies for such an order must show by affidavit to the satisfaction of the court or justice that the case is within this section."

One of the essential requirements to enable the plaintiff to obtain such an order as was made herein is the proof by affidavit that a warrant of attachment has been granted. It is not enough that one has been obtained; such fact must be shown by affidavit to the satisfaction of the court or justice, when the court or judge may grant the order. In this case there was no statement or allegation to that effect in any of the papers filed upon which the order of publication was issued. This defect is a fatal one.

The proceeding to obtain service in the manner sought by the plaintiff herein is purely a statutory one and the statute must be strictly followed. Young v. Fowler, 73 Hun, 179; Whiton v. Morning Journal Assn., 23 Misc. Rep. 299; Kendall v. Washburn, 14 How. Pr. 380.

The fact that an attachment had been issued is shown by the affidavit of the plaintiff, read in opposition to the motion, and the respondent claims that the court below did, and this court should, consider the evidence supplied by such affidavit. The error of that position is, that the necessary jurisdictional facts must be before the court at the time the order was granted, and cannot afterwards be supplied. In the case cited by the respondent (Howe Machine Co. v. Pettibone, 12 Hun, 657) the motion was to vacate and set aside the order of publication, and the judgment, and the order to show cause was granted upon the *judgment-roll,* and the judgment-roll containing the requisite allegations, the court held that in determining such jurisdictional facts, it was

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not limited to the affidavit upon which the order for publication was made.

That case has no application to this. It is also urged by the respondent that the notice of motion herein is defective in not specifying the irregularity complained of. This would be so were the alleged defects mere irregularities, but they are jurisdictional imperfections, and in such cases the notice of motion need not necessarily state them. Emerson v. Auburn & O. L. R. R. Co., 13 Hun, 150, 152; Whiton v. Morning Journal Assn., *supra*.

Order reversed and order of publication vacated, with costs.

TRUAX and GILDERSLEEVE, JJ., concur.

Order reversed and order of publication vacated, with costs.

ARTEMAS H. HOLMES, Respondent, *v.* EMILE LEIGHTON, Appellant.

APPEAL by the defendant from an order of the Special Term of the City Court of the city of New York, denying the defendant's motion to vacate and set aside an execution against the person.

Louis C. Lewis, for respondent.

Wales F. Severance, for appellant.

FREEDMAN, P. J. This action was brought to recover from the defendant the sum of $400, being, as alleged in the complaint, the proceeds arising from the sale of a horse which had been placed by plaintiff's assignor in the hands of the defendant to be sold.

The defendant answered the complaint, and after denying all the allegations of the complaint set up as a separate defense the following:

"Defendant alleges that on or about the 5th day of July 1902 one Lillian S. Holmes delivered to defendant a bay gelding for the purpose of having defendant sell said horse on her account for the sum of $400. less a commission of 10 per cent for the services of defendant as the sales agent of said horse.

"That thereafter and on or about July 7th, 1902 said defendant sold said horse for the sum of $400., and thereafter tendered the plaintiff the sum of $360. in full for the amount received

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by defendant from the sale of the said horse, less his commission of $40. or 10 per cent of the purchase price of said horse which purchase price was the sum of $400. That said tender was refused. That said defendant is ready and willing to pay said plaintiff the sum of $360. the proceeds of the sale of said horse."

From the contents of certain letters that passed between the parties, and which letters were read in a motion for judgment herein, it seems that said tender consisted of defendant sending plaintiff a post-dated check, which was refused and returned to defendant. After the answer was served the plaintiff, claiming that under section 511 of the Code of Civil Procedure, he was entitled to a judgment, made a motion at a Special Term of the City Court for judgment, and an order was made allowing plaintiff judgment for the sum of $360 and costs, said order reciting that the plaintiff "elected that the action be not continued for the remainder of his claim." A judgment was entered thereon and after issue and return of an execution against the property, a body execution was issued, and from the order denying defendant's motion to set aside the last-named execution this appeal comes up.

Plaintiff's complaint charged conversion, but the defendant urges that the plaintiff having entered judgment upon the pleadings must be deemed to have waived the allegations of the complaint and relied upon those of the answer, and that those allegations constitute a cause of action for money had and received and nothing more. We think in this the defendant is in error. The answer admits that plaintiff's assignor placed with the defendant a horse to be sold by him on "her account." That he sold said horse for $400, and that he tendered the plaintiff $360 in full "of the amount received by the defendant" from the sale of the horse. This sum was, however, never paid. In fact said sum was never tendered, merely a post-dated check being offered plaintiff. Under the more recent decisions it has been held that "the relation between a commission agent for the sale of goods and his principal is fiduciary." Baker v. New York Nat. Exch. Bank, 100 N. Y. 31. "Property thus received is received in a fiduciary capacity, and when the property is turned into money, that is also received in a fiduciary capacity. It does not belong to the agent, who can lawfully exercise no power or authority over it, except for the benefit of his principal, and only as authorized by him. If he uses it for his own purposes * * *

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it is a conversion of that which does not belong to him." Moffatt v. Fulton, 132 N. Y. 507, 515; Britton v. Ferrin, 171 id. 235, 242.

The admissions of the defendant's answer clearly place him within the purview of the foregoing decisions, and rendered him liable upon the facts as alleged by him in his answer to a judgment, under which, in default of property, his person was liable upon execution.

Order affirmed, with costs.

TRUAX and GILDERSLEEVE, JJ., concur.

Order affirmed, with costs.

THE BROADWAY TRUST CO., Respondent, *v.* CHARLES P. FRY, Appellant.

APPEAL by defendant from a judgment of the City Court of the city of New York, and from an order denying defendant's motion for new trial.

Charles Green Smith, for appellant.

Ira Leo Bamberger, for respondent.

GILDERSLEEVE, J. In August, 1902, the appellant was receiving teller for the respondent. About August twenty-fifth a shortage of $1,056 occurred in the funds handled by the appellant. How this shortage arose does not appear; certainly no fault, criminal or otherwise, was directly imputed to the appellant by the respondent. A day or two after the shortage became known, Mr. May, president of the trust company, and the appellant had a conversation in which it transpired that the executive committee of the trust company determined to discharge the appellant. Mr. May told the committee that the appellant was not a bank man and "perhaps extenuating circumstances ought to be permitted." He then proposed that the committee should refer the matter to him to see what he could do with the appellant; and this was done. Mr. May then said to the appellant, "You are short $1,056 on your account," and told him that the committee wanted to discharge him, but that he (May) "wanted to give him a chance to do better;" that if he would pay $556 the company would "stand" the other $500, and that he would try

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and keep appellant on; which, he testified, he would have done but for some report by his secretary, the nature of which the witness was not permitted to state. Mr. May further testified that the appellant said he was "very pleased to pay" the $556. The appellant then paid $25 in cash and made the note in suit for $531. Mr. May denied that this note was to be paid out of the appellant's salary; or that he was not to be discharged until the note was paid. The answer denied that the note was made for value, and pleaded, specially, that the respondent agreed not to enforce it; that it should be paid in installments out of appellant's salary as respondent's receiving teller, and that on October 11, 1902, respondent discharged appellant without cause. On the trial the court excluded all testimony concerning circumstances attending the making of the note and the cause of the shortage in question. We think this was error. It was competent to show the want of consideration as between the parties to the instrument, and the denial that the note was given for value entitled the defendant to disprove whatever the plaintiff was required to prove on that subject. Griffin v. Long Island R. R. Co., 101 N. Y. 348; Milbank v. Jones, 141 id. 340; Cary v. Western Union Tel. Co., 47 Hun, 610; N. Y. Sprinkler Co. v. Andrews, 38 App. Div. 56. Enough appears in the evidence to indicate that the existence of a valid consideration for the note was not altogether clear; all that was shown on that subject was that the defendant was short $1,056 in his cash; that the president of the trust company, without charging the defendant with dishonesty or carelessness, and apparently without investigating the matter, proposed that defendant pay $556 of the loss, and that plaintiff would "stand" the rest, intimating at the same time that defendant should retain his position in the company's service. There is nothing in all this to charge the defendant with any liability for the loss; and, if not liable, his note was without consideration. It was not the case of a claim honestly made on one side and disputed on the other; there was no foundation, nor the pretense of any, for requiring defendant to pay any part of the shortage. For aught that appears he was no more blameworthy in the matter than the president himself. During the trial the justice remarked to the jury that "there was $1,056 missing. Apparently this man was accused of being careless, and finally he agreed to give the note in question." This was erroneous, in fact, as the respondent did not charge the appellant with carelessness; and it was necessarily prejudicial to the appellant. Again, in charging

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the jury, the court said the only question for them to consider was how the note was to be paid; also that as matter of law the note was a valid one. Later, in his charge, the judge, referring to the testimony of the defendant that the note was to be paid out of his salary, said, "How does he say, over his own signature, this note was to be paid? Does he say that the $531 was to be paid out of his salary? No; 'On demand I promise to pay,' not 'out of my salary,' but 'on demand I promise to pay $531.' This was not a note that was handed to him made out, it was a note he drew himself in his own handwriting. Now, are you going to allow this man to discredit his own handwriting in that fashion? It is for you to say whether or not you believe in the face of his own handwriting," etc. This part of the charge was calculated to influence the jury to the serious prejudice of the appellant.

It was hardly fair, considering that very many defenses to negotiable paper involve the same apparent inconsistency. These expressions of the court may have excited prejudice in the minds of the jury against the appellant. Davis v. Marvine, 11 App. Div. 440; Davison v. Herring, 24 id. 402; People v. Hill, 37 id. 327; Lorch v. Lorch, 63 N. Y. Supp. 567. Unfortunately, the mind of the justice was confused as to the issues which led him to say, at one stage of the trial, that the only question was whether the note was given on plaintiff's promise not to discharge the defendant; and, at another, that the only question was how the note was to be paid, wholly ignoring the question whether defendant was liable for the shortage for which the note was given. This issue was paramount to the others. This confusion in the justice's mind would naturally be shared in some measure by the minds of the jury. Again, in denying the right of defendant's counsel to except to the charge, then already made, after the jury retired, but before the verdict was rendered, the court plainly erred. Section 995 of the Code expressly allows an exception to the charge to be taken before the verdict is given, and it is even allowed after a sealed verdict has been rendered and the jury has been allowed to separate. Panama R. Co. v. Johnson, 12 N. Y. Supp. 499; Polykranas v. Krausz, 73 App. Div. 583.

For these errors the judgment must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

FREEDMAN, P. J., and TRUAX, J., concur.

Judgment reversed, and new trial ordered, with costs to appellant to abide event.

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ELIAS FRANKFURT et al., Appellants, *v.* LEVI C. WEIR, as President of Adams Express Co., Defendant-Appellant.

APPEAL by both parties from a judgment for fifty dollars and costs, rendered in favor of the plaintiffs by the Municipal Court of the city of New York, ninth district, borough of Manhattan.

Thomas W. McKnight, for plaintiffs-appellants.

Guthrie, Cravath & Henderson (Joseph E. Corrigan, of counsel), for defendant-appellant.

FREEDMAN, P. J. This action was brought to recover from the defendant, as president of the Adams Express Company, the sum of $142.50, the value of one of two packages delivered by the plaintiffs to the Adams Express Company, and to be transported by it to J. N. Barrel, at Ardmore, Ind. Ter., U. S. A. The plaintiffs claim that one of said packages was never delivered. The trial of the issues resulted in a judgment for the plaintiffs for fifty dollars, from which both parties appeal.

At the time of shipment the plaintiffs had in their possession a book of receipts of the defendant company. One of these was filled out and signed by an employee of the defendant company and retained by the plaintiffs. It contained no special insurance nor greater valuation of the property than the sum of fifty dollars, and provided that said sum should in any event constitute the limit of the liability of the company. The receipt contained the identical clauses which were contained in the receipt discussed in the case of Bernstein v. Levi C. Weir, as president of the Adams Express Co., decided at present term of this court (40 Misc. Rep. 635), and to which reference should be made for further particulars. Under the decision of that case the receipt constituted a special contract, and under such contract the defendant in the present case has the right to insist that in no event is his liability to exceed the sum of fifty dollars. The consequence is that, even if the plaintiffs prove their alleged cause of action, the judgment was properly rendered in their favor for only fifty dollars, and their appeal is without merit.

On defendant's appeal it is contended that the plaintiffs did

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not prove a cause of action (1) by failing to prove nondelivery; and (2) by failing to prove compliance with the thirty-day clause of the contract.

The plaintiffs were bound to prove, as part of their case, that the alleged missing package had not been delivered, and this should have been done by competent evidence. The only evidence offered upon this point is hearsay evidence, and there is nothing in the case upon which it can be held that the defendant is estopped from insisting upon competent proof.

As to the thirty-day clause the contract provided as follows: "In no event shall the Adams Express Company be liable for any loss or damage unless the claim therefor shall be presented to them in writing within thirty days after this date in a statement to which this receipt shall be annexed."

Such a provision is in the nature of a condition precedent, is binding on the party who accepts such a contract and precludes him from recovering without proof that the condition has been performed. Kaiser v. Hoey, 16 N. Y. St. Repr. 803; American Grocery Co. v. Staten Island Rapid T. R. R. Co., 23 Misc. Rep. 356; Hirshberg v. Dinsmore, 12 Daly, 420.

But this defense may be waived by the carrier. In the case at bar four months elapsed before the plaintiffs formally complied with the requirements of the thirty-day clause; but the company took informal notice in the meantime, and, as may be inferred from certain parts of the testimony, within thirty days, and it never placed its refusal to pay upon the ground that the formal notice had been filed too late, but, on the contrary, offered to pay the sum of fifty dollars before suit brought. Upon this point, therefore, the case comes within the rule laid down in Falkenberg v. Erie R. R. Co., 28 Misc. Rep. 165, and hence it is not necessary to consider whether, in order to be available, the defense attempted to be based upon the thirty-day clause should be pleaded.

The defendant also contended below, and still contends, that the plaintiffs had no title to the goods, and that the action should have been brought by the consignee. Upon this contention the question is whether the transaction between the consignors and the consignee amounted to a sale of goods in existence by which the title was transferred. In case of such a sale and transfer of title the rule is that the action for the loss or injury of the goods must be brought by the consignee. Levy v. Weir, 38 Misc. Rep. 361, and cases there cited. Upon this point the

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proof, as given at the trial, although meager, brings the case within the rule as stated.

The judgment should be reversed, and a new trial ordered, with costs to the defendant to abide the event.

TRUAX and GILDERSLEEVE, JJ., concur.

Judgment reversed, and new trial ordered, with costs to defendant to abide event.

CHARLES M. CROCKER, Appellant, *v.* HUGO R. MULLER, Respondent.

APPEAL by the plaintiff from a judgment rendered in favor of the defendant in the Municipal Court of the city of New York, eighth district, borough of Manhattan.

Gantz, Neier & McKennell, for appellant.

Hugo R. Muller, for respondent.

FREEDMAN, P. J. This action was brought to recover the value of five volumes of a publication issued by plaintiff's assignor entitled "Universities and their Sons." The books were sold by an agent of R. Herndon Company, of Boston, Mass., and the contract of purchase was signed by the defendant. After a trial the court below rendered a judgment in favor of the defendant. The defendant admits the making of the contract, the delivery of the first four volumes of the work and that he has not paid for the same. In his answer he raises the question of the incorporation of the plaintiff's assignor and the validity of the assignment, and also urges the claim that the plaintiff could not recover by reason of failure to fulfill his contract to insert the name of the defendant and a biographical sketch of his life in the book.

It is evident from an examination of the record that the defendant failed to sustain any of the allegations of his answer.

The plaintiff under the pleadings was not compelled to prove the incorporation of his assignor. Under section 1776 of the Code of Civil Procedure the plaintiff need not prove upon a trial the existence of a corporation unless the answer is verified and contains *an affirmative allegation* that the plaintiff or the defendant, as the case may be, is not a corporation. No such allegation was

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set forth in the answer in this case. Neither was it necessary for the plaintiff to produce a certificate of incorporation from the Secretary of State in order to show that his assignor was entitled to do business in this State. The plaintiff's assignor was a publishing house, having all its books, offices, etc., in Boston; it had no office in this State; it did employ certain men in this State who obtained orders for its publications; the order signed by the defendant was addressed to the corporation in Massachusetts. It was not "doing business" within this State so as to require a certificate as aforesaid. Vaughn Machine Co. v. Lighthouse, 64 App. Div. 138; Droege v. Ahrens & Ott Mfg. Co., 163 N. Y. 466, 471; Hargrave Mills v. Harden, 25 Misc. Rep. 665. The assignment of the claim herein to the plaintiff was sufficiently proven. "An assignment of a chose of action will be held sufficient where the assignor testifies that he intended thereby to transfer his title thereto, as he is thereby estopped from claiming differently, and the debtor is protected from a subsequent action by the assignor." Riker v. Curtis, 17 Misc. Rep. 134. It is practically admitted by the plaintiff that the corporation selling the books was under an obligation according to their contract to print the name of the defendant and his biographical sketch in some one of its books, and that it did not do so. But there is no proof in the case to charge the plaintiff's assignor with an omission to perform its contract, for the following reason: The defendant admitted upon the trial that in order to have the defendant's name and sketch printed he must fill out and send to the company a printed slip which was left with him for that purpose by the agent who took his subscription.

The data the publishers stipulated should be sent so that they would receive it within sixty days. The defendant failed to show that he complied with those requirements. He says he took the printed slip, wrote his name, address, year of his birth and graduation at the college, etc., and mailed it. It does not appear to whom he mailed it, nor when nor that the postage thereon was prepaid.

The judgment upon the proof offered should have been for the plaintiff.

Judgment reversed. New trial ordered, with costs to the appellant to abide the event.

TRUAX and GILDERSLEEVE, JJ., concur.

Judgment reversed. New trial ordered, with costs to appellant to abide event.

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THOMAS FALLON, Respondent, *v.* THE INTERURBAN STREET RAILWAY CO., Appellant.

APPEAL by the defendant from a judgment rendered in favor of plaintiff in the Municipal Court of the city of New York, borough of Manhattan.

Arthur K. Wing, for appellant.

M. Strassman, for respondent.

FREEDMAN, P. J. The pleadings in this case were oral and as appears by the record the plaintiff complained for "damages for personal injuries." He filed a bill of particulars in which he states that "the accident occurred on October 14, 1902 * * * plaintiff having been pushed off the car by the conductor. Loss of earnings * * * $69.00, injuries consisting of contusions of inner surface of elbow of right arm and of joint of thumb of right hand. Reopening of hernia on right side in consequence of the fall and dragging along the street while hanging on to the car from which plaintiff has suffered since the accident," etc.

The facts as proven by the plaintiff are undisputed, the defendant having offered no testimony upon the trial.

The plaintiff testified that he was a passenger on plaintiff's horse car and paid his fare. When the car reached Avenue A and Fourteenth street he asked the conductor "please pull up on that bell." He stood on the platform and had hold of the railing and he says "I turned to ask him if he would please pull up and he gave me a shove off the car. I held on to the railing and was dragged about 30 feet." The plaintiff was corroborated in some essentials by another witness. The plaintiff had received a transfer to the car upon which he was riding, which he had tendered to the conductor, who had refused it, and who had ordered plaintiff to pay his fare or get off the car. He then paid his fare.

The sole point urged by the appellant herein is that the facts show that the conductor was guilty of an assault only, and that while possibly the defendant may be liable therefor, the Municipal Court had no jurisdiction over the cause of action. This case is materially different than the case of Fister v. Metropolitan St. R. Co., 30 Misc. Rep. 430. In the Fister case the complaint expressly set up a "willful, malicious, unprovoked and unjustifiable assault

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and battery." No such allegation is contained in the pleadings in this case. The plaintiff testified that the conductor said "get to Hell off if you are going off and shoved me. When I was shoved off he reached and got my hand where I was holding on and I fell down in the street." These acts on the part of the defendant's servant, while constituting an assault, were as well a violation of the rule laid down in Hart v. Metropolitan St. R. Co., 65 App. Div. 493, the court below saying: "The defendant's servants in the conduct of the cars intrusted to their care are discharging the duty which the defendant owes to the public and to its passengers, and if the gripman or the conductor negligently or willfully pushes such passengers from the cars, from which act injuries result, the plaintiff is entitled to damages, and the conduct of the defendant's servants cannot be transformed into a mere personal assault for the purposes of defeating the jurisdiction of the Municipal Courts, which are peculiarly competent to grant relief which such cases demand. * * * Once the relation of carrier and passenger is entered upon, the carrier is answerable for all consequences to the passenger or the willful misconduct or negligence of the persons employed by it in the execution of the contract which it has undertaken towards the passenger."

The case of Hines v. Dry Dock, East Broadway & B. R. R. Co., 75 App. Div. 391, is a similar case to this, which is to the same effect.

TRUAX and GILDERSLEEVE, JJ., concur.

Judgment affirmed, with costs.

JAMES F. LESTER et al., Respondents, *v.* JAMES WHEATON CLARKE, Appellant.

APPEAL by the defendant from a judgment in favor of the plaintiffs, rendered in the Municipal Court of the city of New York, tenth district, borough of Manhattan.

Jones & McCormick, for appellant.

Frederick M. Thompson, for respondents.

FREEDMAN, P. J. There have been two trials in this action which arose out of the following transaction. According to plaintiffs' testimony, in February, 1896, the defendant came to the

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plaintiffs' warerooms in company with one Lena C. Hubbard, and after introducing her to plaintiffs stated that she wanted to buy some furniture, that she could not pay for it all at that time, but that she was good and that "if for any unforseen reasons she could not pay her debts he would stand back of her and pay her bill." Miss Hubbard purchased a bill of goods at that time, and from time to time subsequent thereto, until her purchases amounted to the sum of $371.38, of which she paid $196.38. On October 12, 1900, plaintiffs sued Miss Hubbard and obtained a judgment against her for $277.16, being the amount of their claim, with interest and costs. Being unable to collect the judgment, and claiming that the defendant was liable to them on the alleged guaranty made by him, the plaintiffs in March, 1901, began suit against the defendant to recover the amount due them. Upon that trial the plaintiffs offered, and it was received in evidence, a letter from defendant to the plaintiffs, which the plaintiffs claimed was a memorandum sufficient to take the case out of the inhibition of the Statute of Frauds, and to render the defendant liable for the debt of Miss Hubbard. Upon appeal to this court, it was held, Justice Greenbaum writing the opinion, that there was no evidence that said letter, which was dated January 27, 1897, was written by the defendant or authorized by him, and the judgment was, therefore, reversed and a new trial ordered. Upon the new trial, from the judgment from which this appeal is taken, the plaintiffs amended their complaint, setting forth two alleged causes of action; the first averring a sale on February 26, 1896, of goods to Miss Hubbard upon the alleged guaranty of the defendant, the amount, etc., the failure to pay, the obtaining judgment against Miss Hubbard, and a demand upon and a refusal to pay said judgment by defendant.

The second cause of action alleged "that on November 21st, 1900 the defendant agreed to furnish the plaintiffs a sufficient number of Rex Fire Extinguishers at the price of eleven dollars each to satisfy said Hubbard judgment, and that in consideration thereof the plaintiffs agreed to accept said extinguishers in satisfaction of said judgment and to refrain from further proceedings to collect the same and to release the guarantor or joint debtor." It further alleges the refusal and neglect of the defendant to deliver said extinguishers and claimed judgment, etc.

The defendant pleaded a general denial and the Statute of Frauds as a defense.

Upon the present trial the plaintiffs made no attempt to prove

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any written guaranty made by the defendant regarding the sale of the goods to Miss Hubbard in February, 1896, and testified that upon that occasion defendant signed no memorandum in writing, stating that he would be accountable for the debt contracted by Miss Hubbard. In their bill of particulars filed herein the plaintiffs allege that the contract claimed and its breach upon which this action is brought is evidenced by 1. A letter from defendant to plaintiffs dated May 23, 1900; copy in defendant's possession. 2. A letter from Frederick W. Thompson (plaintiffs' attorney) to defendant, dated November 15, 1900; original in defendant's possession. 3. A letter from defendant to Thompson, dated November 21, 1900; copy in possession of defendant. 4. A letter from Thompson to defendant, dated November 23, 1900; original in defendant's possession, and by parol evidence of a conversation between the defendant and plaintiffs on February 28, 1896.

As to the first cause of action set up in the complaint, as before stated, the plaintiffs made no attempt to prove any written guaranty on the part of the defendant and gave no testimony relative thereto except oral statements made by the defendant at the time of the sale to Miss Hubbard. The letter of November 21, 1900, which is the basis for the second cause of action set up therein and also set forth in the bill of particulars was not produced on the trial by the plaintiffs and when the defendant offered a copy of such letter as showing the exact nature of the transaction between the parties subsequent to the sale of the goods to Miss Hubbard, the plaintiffs' attorney objected to its introduction and the court excluded it.

The plaintiffs were allowed, however, over the objection and exception of the defendant to introduce in evidence a letter from the defendant to the plaintiffs, dated September 24, 1900, containing statements which the plaintiffs claim constitute a guaranty on the part of the defendant sufficient to take the case out of the Statute of Frauds and render the defendant liable thereon for the debt previously contracted by Miss Hubbard. They rely upon this exhibit, which was not referred to in their bill of items and which is evidently one of a series of letters regarding a proposed settlement of the matters in difference between the parties long subsequent to the time of the transaction as the grounds for their whole cause of action against the defendant; and by their objection exclude another letter which they expressly stated in the bill of particulars to the defendant was the one by which they intended to establish the liability of defendant. The admission of the letter

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of September 24, 1900, even assuming, but not deciding, that it constituted a cause of action against the defendant, was, under the circumstances, reversible error. The office of a bill of particulars is to apprise one party of the items which the other expects to prove and *to limit the recovery thereto.* Matthews v. Hubbard, 47 N. Y. 428.

It has the effect to restrict the proofs and limit the recovery to matters set forth in it. Melvin v. Wood, 3 Keyes, 533; 4 Abb. (U. S.) 438; Stevens v. Webb, 12 Daly, 88.

The plaintiffs also fail to sustain their cause of action for another reason. As before stated they made no claim or offered proof as to there being any evidence creating defendant's liability under the first alleged cause of action at the time of the transaction. In the alleged second cause of action they set up a promise on November 21, 1900, on the part of the defendant to pay the judgment of Miss Hubbard and allege as a consideration for such promise and agreement on their part to forbear and refrain from further proceedings to collect said judgment and to release the defendant from all claims against him as guarantor or joint debtor in the account in which said judgment was rendered. Nothing of this kind was shown. No promise to pay any judgment nor promise to forbear its collection was proven, nor any release nor offer to release was shown.

Judgment reversed. New trial ordered, with costs to the appellant to abide the event.

TRUAX and GILDERSLEEVE, JJ., concur.

Judgment reversed. New trial ordered, with costs to appellant to abide event.

MICHAEL B. CLARK, Respondent, *v.* THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD CO., Appellant.

APPEAL from a judgment of the Municipal Court of the city of New York, seventh district, borough of Manhattan, which said judgment was entered upon the verdict of a jury, and from an order denying a motion to set aside the verdict of the jury and for a new trial.

Henry W. Taft and William Greenough, for appellant.

Palmer & Somerville, for respondent.

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TRUAX, J. It is alleged in the complaint, among other things, that on the 16th day of September, 1901, the plaintiff had engaged passage on the steamer Massachusetts, which said steamer was operated and controlled by the defendant; that plaintiff rented and hired from the defendant for the sum of three dollars, then paid by the plaintiff to the defendant, a stateroom on said steamer for the use and occupancy of the plaintiff from the city of New York to the city of Providence, and was furnished by the defendant with a ticket or voucher therefor; that on the said 16th day of September, 1901, the plaintiff duly demanded from the agent of the defendant, then in charge of the staterooms, the key of the said stateroom and demanded possession thereof; that such possession was refused by the defendant and the plaintiff was not allowed to use said stateroom, and the defendant and the agent and employees of said defendant refused to give plaintiff such accommodation as he became entitled to by the purchase of said ticket; that by reason of the failure of the defendant to furnish plaintiff the said stateroom as aforesaid plaintiff suffered great mental pain and was otherwise damaged.

It was shown on the trial that the ticket or voucher above mentioned had printed on its back the following words: "The right is reserved to resell rooms not called for thirty minutes after departure;" that it was purchased by plaintiff on the boat; that he did not notice the above-mentioned words on the back of the ticket; that after he had purchased the ticket he went out on the deck, where he remained for some length of time; that the plaintiff did not call for the stateroom for more than thirty minutes after the departure of the steamer; that when he did call for said stateroom his attention was called to the words on the back of the ticket, and he was told that the stateroom had been resold; that he asked the purser of the boat either to give him another room or refund the money, which the purser refused to do, and that plaintiff was compelled to sit up all night.

On the trial the court charged in effect that although the plaintiff had shown no physical injury caused by the defendant the jury was entitled to give the plaintiff damages on account of the injuries to his feelings and the indignity put upon him "as a measure in the nature of punishment as smart money," and to this charge the defendant excepted. The jury found a verdict for the plaintiff for $125.

I am of the opinion that this charge was erroneous. Plaintiff was in effect simply a tenant of the stateroom that he had hired

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from the defendant for a night. He was kept out of what might be called the premises that had been demised to him by the defendant and was entitled to recover no more than what he had paid for the use of the room or the value of the room for the term that he had hired it. The action was one simply for a breach of the contract of hiring. It was said in Jacobs v. Sire, 4 Misc. Rep. 398, that in actions for breach of contract, with a single exception, the amount recovered is limited to the actual damage caused by the breach, and that the measure of damage is the same whether the defendant fails to comply with his contract through inability or willfully disregards it. The amount of the verdict shows that the defendant was injured by the above-mentioned charge of the court. The cases referred to by the counsel for the respondent, like Day v. Wordworth, 13 How. (U. S.) 363, and Voltz v. Blackmar, 64 N. Y. 440, are actions in tort in which class of actions it is well settled that under certain circumstances the jury may give punitive damages.

I do not consider it necessary to pass upon the point raised by the defendant that the reservation printed upon the back of the ticket given by the defendant to the plaintiff was a reasonable regulation because I am of the opinion that the plaintiff was entitled to have the use of the room or to have the money that he had paid for the use of the room refunded to him.

Judgment is reversed with costs to the appellant and a new trial ordered, unless plaintiff stipulates to reduce the judgment to three dollars and costs, in which event the judgment so modified is affirmed without costs to either party in this court.

FREEDMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed, with costs to appellant, and new trial ordered, unless plaintiff stipulates to reduce judgment to three dollars and costs, in which event judgment so modified is affirmed, without costs.

WILLIAM J. O'BRIEN, as Sheriff, Etc., Respondent, *v.* JAMES A. ALLEN, Appellant.

APPEAL by the defendant from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, seventh district, borough of Manhattan.

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E. Harding, for appellant.

S. W. Stern, for respondent.

TRUAX, J. This is an appeal from a judgment of the Municipal Court, and from an order denying the defendant's motion for a new trial. On the 10th day of November, 1887, one Christian Meller obtained a judgment in the City Court of the city of New York against one Louis J. Porr for the sum of $1,637.85. On the same day an execution was issued thereon against the real and personal property of said Porr to the sheriff of New York county, and on the 15th day of November, 1887, the said sheriff returned the said execution wholly unsatisfied. Christian Meller died on the 12th day of February, 1890, intestate. On the 24th day of October, 1902, one Frieda Morian, daughter of said Christian Meller, retained the defendant herein, as her attorney-at-law, to procure letters of administration *de bonis non* upon the estate of the said Christian Meller remaining unadministered, and to collect the said judgment. The defendant procured the issuance of such letters *de bonis non*, and was directed by the said Frieda Morian to issue an execution upon the above-mentioned judgment, in her name as such administratrix, against the property of the said Porr, the judgment debtor, and such execution was, on the 24th day of October, 1902, issued to the sheriff of the city and county of New York. On said day the sheriff levied on certain personal property of the said Porr, the defendant in the judgment. On the 25th day of October, 1902, the said Porr exhibited to the said sheriff a written instrument, purporting to be a release of the said Porr from said judgment, dated the 11th day of December, 1888, and thereupon the sheriff withdrew the keeper that he had put in charge of said property and released his levy thereon. On the 28th day of October, 1902, the sheriff returned the said execution wholly unsatisfied, and in his return assigned as his reason therefor that said judgment had been satisfied.

This action was brought by the plaintiff to recover the sum of $102.70 as poundage on the said execution.

The right of a sheriff to fees is derived from and depends upon statute. At common law a sheriff could not lawfully receive fees. The statute in force, subdivision 7 of section 17 of chapter 418 of the Laws of 1892 (which chapter amends chapter 523 of the Laws of 1890) provides that the sheriff is entitled to cer-

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tain fees where he makes a collection or where a settlement has been made after levy, or where the execution has been vacated and set aside. Campbell v. Cothran, 56 N. Y. 279. In this case the sheriff did not make a collection nor was a settlement made after levy, nor was the execution vacated or set aside, and, therefore, the sheriff is not entitled to poundage. It was held in the case of Flack v. State of New York, 95 N. Y. 461, that a sheriff's right to poundage is made, by the language of the statute, to depend exclusively upon the collection of the money called for by the process, and that no right to the statutory fees can arise in favor of the sheriff, except on collection of the execution, or the interference by the plaintiff in the execution by the performance of some act which in law is deemed to be the equivalent of collection. The case now before this court does not show any interference by the plaintiff in the execution which should be deemed in law the equivalent of collection. It is also to be borne in mind that the defendant in this action was not the person in whose behalf the execution was issued. He was simply acting as attorney for that person. In Van Kirk v. Sedgwick, 87 N. Y. 265, it was held that the sheriff may look to the attorney only when the judgment itself is satisfied or discharged, or the attorney has countermanded the execution. The plaintiff herein does not allege that the defendant satisfied or discharged the judgment, or that he countermanded the execution, and, therefore, the plaintiff failed to show facts entitling him to recover from the defendant herein as attorney who issued the execution.

Judgment and order appealed from reversed, and new trial ordered, with costs to the appellant to abide the event.

FREEDMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment and order reversed, and new trial ordered, with costs to appellant to abide event.

REUBEN AUERBACH, Respondent, *v.* BARNETT ROGIN, Appellant.

APPEAL by the defendant from a judgment rendered in the Municipal Court of the city of New York, fourth district, borough of Manhattan.

C. Frankel, for appellant.

J. Winkelfield, for respondent.

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GILDERSLEEVE, J. The pleadings are oral. The complaint is "by a surety against his principal for money paid, laid out and expended upon a breach of contract in writing." The answer is a "general denial, bill of particulars." The summons is dated February 16, 1903, and requires defendant to appear, "immediately after your (defendant's) arrest in this action." Municipal Court Act, § 58. On the same day an order of arrest was issued against defendant, which was based upon several affidavits and an undertaking on arrest. The charge against defendant, upon which the arrest was based, was that defendant had disposed of his property, with intent to defraud his creditors, including plaintiff. The Municipal Court has power to grant the order upon proof of such a charge. Municipal Court Act, § 56, subd. 4. A motion was made at the commencement of the trial to vacate this order of arrest, which motion was based upon the alleged insufficiency of the papers upon which it was granted. The justice held that the intent to defraud was sufficiently established by the affidavits, and denied the motion. Upon the trial the defendant offered no evidence whatsoever. The plaintiff showed that he had become surety on a bond for defendant, that defendant had contracted with plaintiff to hold the latter harmless, and to pay whatever loss the plaintiff might suffer by reason of being such surety, and that, by reason of such obligation, the plaintiff was compelled to pay $150 to Fried & Co., and to give his notes for $350 more, which notes are not yet due. The justice gave judgment for plaintiff for $500 damages, and $33 costs. Defendant appeals from said judgment and from an order denying his motion to set aside the said order of arrest. Upon the judgment is stamped the words "Defendant subject to arrest and imprisonment."

As we have seen, the complaint was oral, and the only reference in the summons to the claim of plaintiff to the arrest of defendant is as follows: "You are hereby summoned, and required to appear, in this action, before one of the justices * * * immediately after your arrest in this action," etc. We have also seen that the judgment states that defendant is subject to arrest and imprisonment. Section 39 of the Municipal Court Act provides as follows: "In an action where an execution may issue against the person, upon a judgment rendered in favor of the plaintiff, *unless a verified complaint is served with the summons,* a general reference to that fact must be indorsed by the clerk upon the summons, and upon the copy to be served on defendant,

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in the following form, 'Plaintiff claims defendant is liable to arrest and imprisonment in this case.' In the event of there being no such indorsement, no execution against the person shall issue, and the proof of service of such summons must show that the copy served on the defendant likewise had such indorsement upon it."

Upon the trial of this action no question of a fraudulent disposal of property was raised, except by the motion to set aside the order of arrest, which motion was based, as we have said, entirely upon the alleged insufficiency of the affidavits in showing a fraudulent intent. This ground the justice held to be untenable. We agree with this conclusion of the court below. The affidavits show satisfactorily an intent, on defendant's part, to defraud his creditors and plaintiff by the transfer of his property.

The provision in the judgment, for the arrest and imprisonment of the defendant, was improper, however, as we have seen, under the above-quoted section 39 of the Municipal Court Act.

The judgment, therefore, must be modified by striking out the words, "Defendant subject to arrest and imprisonment." The order, however, denying the motion to vacate the order of arrest on the ground of the alleged insufficiency of the papers upon which it was granted, must be sustained. This decision is not inconsistent with the above modification of the judgment. The order of arrest was a preliminary measure pending the trial of the action, and is merged in the judgment. For all intents and purposes, therefore, it has ceased to exist. However, the defendant appealed from the court's refusal to set it aside, and we are called upon to pass upon the issue thus raised. We conclude, therefore, that the order, denying defendant's motion to vacate the order of arrest, must be affirmed, with ten dollars costs and disbursements.

The appellant claims that the justice was wrong in allowing $500, as damages, since it is conceded that, at the time of the trial, the plaintiff had paid only $150, while the remaining $350 were in the form of promissory notes, which plaintiff had not yet paid for the reason that they had not matured.

Where a surety gives his negotiable note for the debt of his principal, and such note is received expressly in satisfaction of the said debt, this is to be regarded as equivalent to the payment of the money, and the obligation of the principal to the surety has accrued, although the note has not yet been paid. Elwood v. Diefendorf, 5 Barb. 398; 24 Am. & Eng. Encyc. of Law (1st ed.), 779.

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In the case at bar, the witness Peikes, a member of the firm of M. Fried & Co., testifies as follows: "Q. Did you accept his (plaintiff's) notes of $500 in payment for the bond (Plff's. Ex. 1), and the notes of defendant (Plff's. Ex. 2)? A. Yes, sir. Q. After he gave you the notes for $500 did you deliver this bond and these notes to Auerbach (plaintiff)? A. Yes, sir. Q. And he has them now? A. Yes, sir."

It, therefore, appears that the notes of plaintiff were expressly received in satisfaction of the debt of the principal. As between the surety, plaintiff, and the principal, defendant, these notes are equivalent to money, paid by plaintiff to M. Fried & Co., in discharge of the principal's obligation to said Fried & Co. We are of opinion that the justice was warranted in allowing to the plaintiff the whole amount claimed, including the $150 actually paid in cash by plaintiff to M. Fried & Co., and the $350 given in notes which have not yet matured.

The judgment is modified, as above indicated, by striking out the words "Defendant subject to arrest and imprisonment," and, as thus modified, it is affirmed, with costs. Order denying motion to vacate order of arrest affirmed, with ten dollars costs and disbursements.

FREEDMAN, P. J., and TRUAX, J., concur.

Judgment modified, as above indicated, by striking out "Defendant subject to arrest and imprisonment," and as thus modified, affirmed, with costs. Order affirmed, with ten dollars costs and disbursements.

THE LEHIGH & NEW ENGLAND RAILROAD CO., Respondent, *v.* THE AMERICAN BONDING AND TRUST CO., Appellant.

APPEAL by the defendant from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, first district, borough of Manhattan.

Jonathan Deyo, for appellant.

William B. McNiece, for respondent.

GILDERSLEEVE, J. An action was brought, in the Supreme Court, by one Annie E. Distler against the plaintiff herein, the Lehigh & New England Railroad Company, in which action the

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said Distler obtained an attachment. The defendant herein, the American Bonding & Trust Company, was the surety on the undertaking given on said attachment by said Distler. The attachment was vacated, and the defendant in the said Supreme Court action, the said Lehigh & New England Railroad Company, brought this action, on the undertaking, given on said attachment, against the said American Bonding & Trust Company, as surety, for the damages sustained by reason of such attachment. The justice gave judgment for the plaintiff.

Both the plaintiff and the defendant are foreign corporations. The defendant's appeal is based solely on the claim (1) that the Municipal Court had no jurisdiction, because the defendant is a foreign corporation; and (2) that plaintiff has not shown that it has complied with the requirements of section 15 of the General Corporation Act, which provides that before a foreign corporation is entitled to maintain any action in this State, upon any contract made by it in this State, it must procure from the Secretary of State a certificate, etc.

In support of its first contention the defendant relies upon the cases of Rieser v. Parker & Co., 27 Misc. Rep. 205, and Lake Geneva Ice Co. v. Selvage, 28 id. 581, where the Appellate Term of this court held that, although the Legislature conferred upon the Municipal Court jurisdiction of an action against a foreign corporation for the recovery of money only, such act of the Legislature violated sections 14 and 18 of article VI of the Constitution of 1894, and was void. The defendant further urges that as the want of jurisdiction extends to the subject-matter of the action, no waiver of the jurisdictional defects exists, nor could jurisdiction be conferred by consent; and that, therefore, the question may be raised on appeal, even if it was overlooked at the trial. Parkhurst v. Rochester Machine Co., 65 Hun, 489.

In support of the second ground, urged for reversal, the defendant's counsel refers to the conceded fact that plaintiff has neither alleged in the complaint nor proved at the trial that it has obtained the certificate mentioned in the said section of the General Corporation Law.

We will discuss the two grounds urged by defendant in the order presented by the defendant's counsel.

The Municipal Court Act (in section 1, subd. 18) provides that the Municipal Court has jurisdiction in a case against a foreign corporation, if the latter has an office in the city of New York. It is conceded that defendant has an office in this city.

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In the case of Worthington v. London Guarantee & Accident Co., 164 N. Y. 81, the highest court in this State held that the provision of the statute, "that the Municipal Court shall have jurisdiction of a foreign corporation, having an office in the city of New York, does *not* violate the Constitution of the State of New York, but merely confers upon the Municipal Court the jurisdiction which has been exercised for many years by the local tribunals consolidated in that court." The doctrine, therefore, of the cases of Rieser v. Parker & Co., and Lake Geneva Ice Co. v. Selvage, relied upon by the defendant's counsel, has been disapproved by a higher tribunal, and is unavailing here. The first ground urged by defendant's counsel is untenable.

Assuming that we could hold that this action was brought on a contract made by plaintiff in this State, within the meaning of the General Corporation Act, we would still be unable to find any merit in defendant's contention that it was incumbent on the plaintiff to allege in the complaint, and to prove as a preliminary requisite and as part of the affirmative case, that it had procured the said certificate.

In the case of Parmele Co. v. Haas, 171 N. Y. 583, the Court of Appeals held as follows: "When a foreign corporation brings a suit in the courts of this state and states a good cause of action in the complaint, it will be assumed that it is rightfully in the state and properly in court until the contrary is made to appear. The question is one merely of pleading or procedure, and it does not go to the substance of the plaintiff's claim. Compliance with this statute was no part of the plaintiff's case, which was to be affirmatively stated. * * * The defendant may waive the provisions of this statute and defend the action brought against him upon the merits, and unless he elects to defend or raise some question under the statute by some affirmative act or pleading the court will simply look at the cause of action as stated. * * * That objection, if the defect appears upon the face of the complaint, must be taken by demurrer. If it does not appear upon the face of the complaint it may be taken by answer. If not taken either by demurrer or answer is deemed to have been waived."

In the case at bar the pleadings in no way raise the objection under discussion, and it must be held to have been waived.

The judgment must be affirmed, with costs.

FREEDMAN, P. J., and TRUAX, J., concur.

Judgment affirmed, with costs.

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When a mandamus proceeding against a city official does not abate with his term — Substitution of successor.— A proceeding taken, by an alternative writ of mandamus, by an employee of a city department to procure his reinstatement by the head of the department, after an alleged illegal removal, does not abate when the head of the department goes out of office. His official successor need not be substituted as defendant, but it is better practice that he be substituted. People ex rel. Hatch v. Lantry, 428.

ACCORD AND SATISFACTION.

Vendor and vendee.— Where, after a genuine dispute has arisen, between a vendor and a vendee, as to the amount due on the sale, the vendor accepts, retains and uses the vendee's check, for a smaller sum, stated on its face and in an accompanying letter and statement of account to be in full for the goods sold, there is an accord and satisfaction which concludes the vendor. Jones v. Keeler, 221.

ACCOUNTING.

See **Assignment for Benefit of Creditors; Executors and Administrators; Trustees.**

ACTIONS.

See **Attorneys; Fraudulent Conveyance.**

AGENCY.

1. *Principal bound by agent's acts.*— Where the principal accepts the fruits of his agent's contract he is bound by all the instrumentalities through which the benefit was obtained. Budd v. Howard-Thomas Co., 52.

2. *Powers of a clerk of a local representative of an indemnity company — Waiver.*— A clerk in charge of the business of the local representative of an indemnity company has power, when the local representative is absent from home, to issue and deliver a bond of indemnity, given under the Liquor Tax Law, and the clerk may waive a written condition of its issue. Therefore, where the bond stipulated that it should bind the company only when signed by its local representative and he did not sign it when it was issued but before issue promised to sign it and upon his return home did sign it, although a breach had previously occurred of which he was ignorant, the court held the company liable upon the bond, either upon the ground of waiver or upon the ground that the subsequent signature of the local representative was merely formal and that by it he only did what he had promised to do. Cullinan v. Bowker, 439.

See **Contract; Sales.**

ANIMALS.

Liability of the owner of a vicious dog to a trespasser — Defense not demurrable for not containing denials.— It is not an affirmative defense to a complaint against the defendant, for knowingly keeping a vicious dog which when at large bit the plaintiff, for the defendant to answer that the plaintiff was a trespasser upon the defendant's premises at the time when the plaintiff was bitten. Leonorovitz v. Ott, 551.

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APPEAL.

1. *Jurisdiction of Municipal Court assailable for the first time on.*— A question which affects the jurisdiction of the Municipal Court of the city of New York may be raised for the first time on an appeal to the Appellate Term of the Supreme Court. Matter of Stuyvesant Real Estate Co., 205.

2. *Municipal Court of the city of New York — Payment of costs and fees when unnecessary on filing notice of appeal — Waiver.*— It is not a valid objection to the hearing of an appeal in an action begun, in the Municipal Court of the city of New York, before, but in which issue was joined after, Sept. 1, 1902, when the Municipal Court Act went into effect, that the appellant did not upon filing his notice of appeal with the clerk pay him his fee for a return and the costs of the action, and this because the Municipal Court Act (L. 1902, ch. 580) governs and does not require such payment in such case. Service by the respondent of amendments to the case on appeal is a waiver of any defects in the appellant's procedure. Cooley v. Pennsylvania R. R. Co., 239.

3. *Municipal Court of the city of New York — Order opening default not appealable — Default opened on terms.*— In an action begun in the Municipal Court of the city of New York after Sept. 1, 1902, when the Municipal Court Act (L. 1902, ch. 580) went into effect, the defendant may appeal from a judgment taken against her upon her default, but is prohibited by section 257 of said statute from an appeal from an order opening her default. The order may, under section 253 of said statute, lawfully provide that the judgment stand as security. Long Branch Pier Co. v. Crossley, 249.

ARREST.

Municipal Court of the city of New York — Construction of L. 1902, ch. 580, § 68, as to discharge from arrest — Subsequent issue of an execution against the body — Code Civ. Pro., § 572, inapplicable to Municipal Court.— Where a plaintiff, who in Oct., 1902, procured an order of arrest in an action in the Municipal Court of the city of New York and thereafter recovered judgment against the defendant, fails to take out an execution upon the judgment before the expiration of twenty-four hours after he was entitled to the judgment, the defendant, although he has given bail, is entitled to his discharge under L. 1902, ch. 580, § 68. His discharge does not defeat the right of the plaintiff to the subsequent issue of a body execution upon the judgment, in the form prescribed by L. 1902, ch. 580, § 271. Code Civ. Pro., § 572, does not apply to the Municipal Court and, therefore, its concluding provision that "A defendant discharged as prescribed in this section shall not be arrested upon an execution issued upon the judgment in the action" has no application to the matter. Rogow v. Clark, 208.

See **Malicious Prosecution.**

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Commissions and costs of his accounting.— Although an assignee for benefit of creditors has neglected during six years to invest the fund yet, where, upon his accounting, he has not been charged with interest, he will not be denied commissions or the taxable costs of his accounting. Matter of Bostwick, 17.

ATTORNEYS.

1. *Counsel fee awarded him in a wife's action for a separation collectible of the decedent husband's estate — Necessaries.*— An attorney, who was retained by the wife in an action which she brought for a separation from her husband, who procured therein an order allowing him a reasonable counsel fee on account of his services to her, but who took no steps to collect it during the husband's lifetime, may, after his death, where his executors have rejected the claim, maintain thereon an action against them as such and this because the claim is to be deemed a debt to the attorney contracted by the husband in his lifetime. Such an action may also be maintained upon the

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ATTORNEYS — Continued.

ground that the services of the attorney were a "necessary" to the wife for which she might lawfully pledge her husband's credit. Kellogg v. Stoddard, 92.

2. *Refused leave to continue an action after the parties had settled it.*— The parties to an action have a right to settle it and where they have done so the attorney for the defendant will not be permitted to continue the action in order to get costs against the plaintiff as compensation for services rendered his own client. Pomeranz v. Marcus, 442.

See **Partnership; Supplementary Proceedings.**

AUCTIONEERS.

New York city — Action to recover part of a license fee paid under L. 1897, *ch.* 682 — *Duress — Estoppel.*— An auctioneer of the city of New York licensed under the general act (L. 1897, ch. 682, § 2) by the mayor, for a fee of $250, from Sept. 15, 1897, to June 15, 1898, cannot recover of the city so much of the fee as was applicable to the time from Jan. 1, 1898 — when the present charter (L. 1897, ch. 378) requiring no license fee went into effect — to June 15, 1898, nor is he given any such right by section 34 of the charter. The charter did not impliedly repeal L. 1897, ch. 682, nor did it make the license void. *Semble,* that a person who voluntarily pays the city a fee for a license, as auctioneer, cannot subsequently recover the fee as paid under duress, and is also estopped from asserting that the mayor had no power to exact the fee. Ryan v. City of New York, 228.

See **Foreclosure.**

BAIL.

See **Statute of Limitations.**

BANKRUPTCY.

See **Executors and Administrators.**

BANKS.

See **Transfer Tax.**

BENEFIT SOCIETIES.

When the beneficiary's rights vest — Action by her to reinstate a suspended policy where the insured was not shown to be dead.— Under a policy of benefit insurance, securing to the beneficiary, a wife, upon the death of the insured, her husband, a certain sum in a widows and orphans' benefit fund, and also reserving to him the right arbitrarily to change the beneficiary at any time, she has no vested rights in the fund until he dies. Therefore, where he has merely disappeared, she has no title upon which to maintain an action, "to reinstate with full force and effect" the policy, designed to test the validity of the legislation and action of the benefit order under and by which it, after his disappearance, passed a law requiring a member to report to the council within six months after receipt of a notice sent by registered mail to his last known place of residence or, in the alternative, be suspended, and then suspended him when, after such notice and within six months thereafter, he failed to report to the council. While the husband is living he alone can test the validity of his suspension. Pollak v. Supreme Council, 274.

BROKERS.

Action for broker's commissions — Default of his principal — As an incumbrance.— A sealed agreement, binding adjoining owners, their heirs and assigns, one of whom has no easterly wall to his house and only a right to support its beams in the wall of the adjoining house, providing that, if the latter wall shall be destroyed by fire or become unsafe, both owners will at their joint expense construct a new wall, the same to be a party wall and stand one-half on the land of each, constitutes a covenant running with the lands and is an incumbrance on each lot. Therefore, where the owner of the house, which has no easterly wall, employs a broker to get him a loan on that house and agrees with the broker to furnish a title "free and clear from

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BROKERS — Continued.

all incumbrances," the broker, upon procuring a person able and willing to make the loan, has earned his commissions and his principal is in default as he has failed to furnish the title he agreed to furnish. Finck v. Bauer, 218.

See **Insurance (Fire); Party Wall.**

BUILDING AND LOAN ASSOCIATIONS.

Usury — Equities of borrowing members where the association is insolvent. — An agreement, by the terms of which a savings and loan association, incorporated under L. 1851, ch. 122, exacts from a borrowing member not only interest on a loan made by it but also premiums thereon, is not usurious. Where the association becomes insolvent and a receiver thereof proceeds to foreclose a mortgage given by a member as security for money borrowed from the association, such member should be charged with the loan and interest thereon to judgment but cannot be charged with premiums agreed to be paid. Any premiums paid by such member must be credited upon the loan. Dues on stock paid in by such member are not to be considered in the foreclosure action and can be neither charged therein to the member nor offset in the member's favor against the loan. All moneys so paid in as dues must await the final distribution by the receiver and the member must accept such dividend thereof as the courts may declare. Roberts v. Murray, 339.

CARRIERS.

See **Express Companies.**

CERTIFICATE OF REASONABLE DOUBT.

See **Criminal Law.**

CERTIORARI.

To review a determination — Attorney may verify petition — Parties — Code Civ. Pro., §§ 2127, 2129, 2137.— A petition for a writ of certiorari to review a determination by which a person is aggrieved may be verified by the authorized attorney of the person. Where the determination has been made by a board appointed in a city under a special statute, the city, although beneficially interested in sustaining the determination, is not a necessary party to the proceeding. The fact that the city may be brought in under Code Civ. Pro., § 2137, does not make it a necessary party. Matter of Belmont, 133.

CITATION.

Sale of decedent's real estate — Publication of citation not required to be completed eight days before the return day — Code Civ. Pro., §§ 441, 2520, 2524.— A citation, issued in a proceeding to sell a decedent's real estate, is not invalidated by the fact that service thereof by publication was not completed more than eight days before the return day and it is sufficient for jurisdiction that publication was completed before that day. The Code provision that service of a summons and complaint upon a defendant by publication is not complete until the last day thereof does not apply to or govern a citation. A citation is unlike a summons in that it contains a fixed return day and no demand that the party served appear and answer within a fixed time. It is sufficient that service of a citation is made after issue and eight days before the return day. Matter of Denton, 326.

CITY OF NEW YORK.

1. *Exemption of a social settlement from water assessments refused — L. 1902, ch. 605, § 2.*— A building in the city of New York, adjoining, owned and used by, a church, in part for its own purposes and in part for those of a social settlement there conducted by its officers, is not entitled to exemption from water assessments under L. 1902, ch. 605, § 2, as the statute grants exemption to a social settlement as an independent entity only, while the

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CITY OF NEW YORK — Continued.

double uses to which the building is put make it impossible to distinguish those of the settlement from those of the church. People ex rel. Trustees v. Monroe, 286.

2. *Installation of water meters — "Water furnished for business consumption" — Injunction.*— Section 475 of the charter of the city of New York does not confer upon the city commissioner of water supply discretionary authority to install and maintain water meters in premises of said city other than in such as are wholly or partly subjected to use in some regular calling or vocation; and he requires authority from the board of aldermen to install and maintain a meter in an apartment house. The act of the owners of such a house in supplying, pending installment by him of a separate plant, to the former owner of the apartment house, their next door neighbor living in a private dwelling, water for heating and lighting purposes does not make the apartment house a place in which water is furnished by the department "for business consumption" within the charter or the Consolidation Act (L. 1882, ch. 410, § 352). Foster v. Monroe, 449.

3. *An "orderly" of the department of correction cannot recover a "keeper's" salary although detailed to do his work.*— A person duly appointed in 1897 by the head of the New York city department of correction as an "orderly" in the workhouse on Blackwell's Island, but who in the next month was told by the warden of that workhouse to report at Hart's Island and who there performed for nearly two years the duties of a "keeper", an office having an annual salary attached, cannot recover of the city the difference arising out of the higher salary of a keeper where there is no evidence that the head of the department ever made any appointment of the orderly as keeper or delegated to the warden power to make it or ever had actual or constructive notice of it. Stenson v. City of New York, 533.

4. *Lighting tenement-house halls.*— L. 1895, ch. 567, § 9, relative to the artificial lighting of hallways in New York city tenement-houses having no windows opening from the hallways outside of the house, remained in force as to such a house until glass panels had been substituted, under L. 1901, ch. 334, for the wooden panels in the doors at the end of the public halls and opening into rooms, and therefore where a tenant of such a house was injured on July 2, 1901, soon after noon by stumbling over a board in the unlighted public hallway which was so dark that he could not see his way, the court held personally liable trustees who as such had legal title to the house and by the will of their testator were bound to keep it in repair. Gillick v. Jackson, 627.

See **Auctioneers; Civil Service; Indictment; Liquor Tax Law; Taxes.**

CITY OF ROCHESTER.

See **Taxes.**

CITY COURT OF NEW YORK.

See **Costs.**

CIVIL SERVICE.

Reasonable curtailment of the time of a laborer in department of highways — Acquiescence.— An assistant foreman of street repairing in a borough of the city of New York, appointed to his position from the civil service list and who is paid wages for his work, cannot, after being with others put on three-quarters time for about nineteen weeks by the city department of highways because its annual appropriation would otherwise have been exhausted, recover of the city for the quarter days he was laid off, as such curtailment of his day's labor is not unreasonable under the circumstances, and is within the power of the head of the department notwithstanding the provisions of the Civil Service Law. Where he weekly signs, by making his mark, a payroll

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CIVIL SERVICE — Continued.

whose heading states that the payment is in full, and where he understands that he is being paid for all the work he has done, he must be deemed to have acquiesced in the reduction of his time whether or not he knew the tenor of such heading and although he protested against the reduction when the order was promulgated. Bannister v. City of New York, 408.

CODE OF CIVIL PROCEDURE.

§ 382, subd. 5. Slayback v. Raymond, 601.
§ 572. Rogow v. Clark, 208.
§ 829. Matter of Woodbury, 143.
§ 835. Phoebus v. Webster, 528.
§ 1489. American Surety Co. v. Cosgrove, 262.
§ 1525. Barson v. Mulligan, 470.
§ 1774. Rothstein v. Rothstein, 101.
§§ 1942, 1946. Siefke v. Minden, 631.
§ 2137. Matter of Belmont, 133.
§ 2231, subd. 2. McMahon v. Howe, 546.
§ 2240. Matter of Stuyvesant Real Estate Co., 205.
§ 2471a. People ex rel. Stryker v. Van Bergen, 139.
§ 2596. Matter of Maybee, 518.
§ 2719, subd. 2. Matter of Hewitt, 322.
§ 2727. Matter of Cruikshank, 325.
§ 2818. Matter of Chase, 616.
§ 3216. Duke v. Caluwaert, 623.
§ 3251, subd. 3. Bloch v. Linsley, 184.
§ 3297. Harrington v. Bayles, 388.

CODE OF CRIMINAL PROCEDURE.

§ 308. People ex rel. Acritelli v. Foster, 19.
§ 465, subd. 7. People v. Sullivan, 308.

COMPLAINT.

See **Pleading.**

CONSIDERATION.

Promise.— The compromise of a doubtful claim is a good consideration for a promise to pay money and the promisor cannot subsequently escape payment by showing that the claim was invalid. Cowen v. Rouss, 105.

CONSTITUTIONAL LAW.

Liquor Tax Law — Revocation of certificate — Unconstitutionality of section 28, subdivision 2, as amended in 1901 — Petition.— The provisions of the Liquor Tax Law (L. 1896, ch. 112, § 28, subd. 2, as amd. L. 1901, ch. 640, § 5) authorizing the justice, judge or court, on the return day of the order to show cause, to cancel the certificate unless the holder, if duly served, then files a verified answer denying all the violations alleged, are unconstitutional. Where, therefore, the certificate holder attacks the constitutionality of the statute on the return day and refuses to file a verified answer, the court cannot take testimony or appoint a referee and will not cancel the certificate. A petition for revocation, made on information and belief, setting forth the statutory allegations and having annexed to it the affidavits of two persons minutely stating the violations of the statute and as upon personal knowledge, is sufficient to confer jurisdiction upon the court. Matter of Cullinan, 423.

CONTEMPT.

Civil — Disobeying an order to complete on a judicial sale — Defects in practice and papers — Code Civ. Pro., §§ 14, 2269.— A motion to punish a purchaser at a foreclosure sale for a contempt in having failed to comply with an order directing him to complete must be made by an order to show cause

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CONTEMPT — Continued.

and is fatally defective if made on notice of motion. The papers are fatally defective where they fail to show any facts from which the court can adjudge that any right or remedy of the plaintiff has been defeated, impaired, impeded or prejudiced. Where the court by an oversight ordered the purchaser to complete on the very day the order was made, it directed the order resettled to the end that it might determine whether it would direct completion of the sale or a resale, the purchaser to be liable for the deficiency and for the expenses of the resale — either disposition being admissible. Dunlop v. Mulry, 131.

See **Jurisdiction; Transfer Tax.**

CONTRACT.

1. *For a sale by installments — Rights of parties after the vendees have prevented performance.*— Where vendees, after having contracted with a middleman for the delivery of 5,000 barrels of cement, made by only one company, in weekly installments covering about four and one-half months, notify him about the time of the first delivery not to deliver any more until further notice, they have prevented performance and made the first default where it appears that he would have been able to fulfill if they had not interfered. Where, at their request, the middleman subsequently resumes deliveries, but ultimately becomes unable to complete because, through no fault of his own, he could not get the cement of the company, the vendees cannot recover of the middleman the extra cost of the cement which they had to buy and he could not furnish, while he may recover of them the value at the contract price of the deliveries he made them after their default. Pitts v. Davey, 96.

2. *Pleading — Illegality not provable under a general denial — Changing position on the trial.*— Where the plaintiff sues for specific performance of a contract alleged to have been made by him with the defendant, upon conveying to her real estate, by the terms of which she agreed to reconvey upon the termination of a proceeding to determine his competency to care for himself and his property, the defendant cannot, where she has not alleged illegality but has merely denied generally and set up title in herself as a purchaser for value, move after being defeated to set aside a verdict for the plaintiff upon the ground that the contract was illegal because entered into by both parties to thwart the lunacy proceeding and prevent a conveyance to a committee, if appointed. The illegality of a contract will not be presumed; it is not issuable under a general denial unless it appears on the face of the complaint or, necessarily, from the plaintiff's evidence. Lee v. Lee, 251.

3. *Vendor's election as to the manner of his performance — Vendee's option to order more goods, how lost.*— An executory contract to deliver "200 to 300 tons" of pig iron, 25 tons in November "and balance as ordered within the next six months" is sufficiently performed by the delivery by the vendor of 200 tons and this under the rule that where an obligation may be performed in one of two ways the obligor has a right to elect in which way he will perform. If the contract is to be construed as giving the vendee an option to order an additional 100 tons at the price fixed, the vendee lost its option by failing to exercise it within the six months next after the date when the contract was made. Delay, in delivering the 200 tons, when acquiesced in by the vendee, does not extend the latter's time to exercise its option to order the additional 100 tons. Farquhar v. New River Mineral Co., 404.

4. *Public policy — Agent hired for a contingent compensation to get orders for Government supplies.*— An agreement, to compensate an agent for procuring orders from the United States Government for supplies for its vessels by giving him one-half of the net profits on the orders he obtained, is not void as against public policy and is enforcible by the agent against his principal. An owner of goods has a right to employ an agent to sell them to the govern-

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CONTRACT — Continued.

ment and the employment is valid where there is no proof that the agent was expected to or did resort to improper methods or unfair dealings in procuring the orders. Swift v. Aspell & Co., 453.

See Insurance (Fire); Partnership; Pleading; Statute of Frauds; Towns.

CONVERSION.

Complaint by a co-tenant of personalty — Exclusive possession by the other tenant.— A complaint, in conversion, by one of two sons, equal legatees under their father's will, of his trucking business, alleging that the other son is in possession and has refused on demand to pay the plaintiff for his half, states no cause of action where it fails to allege facts showing that the property can be actually divided and severed, and does not allege any sale or loss or destruction of the property itself or any destruction of the plaintiff's power of beneficial enjoyment. McCarthy v. McCarthy, 180.

CORPORATIONS.

1. *When it may sue without a certificate of authority because not "doing business in this State".*— A foreign stock corporation, having no office or place of business in the State of New York, which, by its traveling salesmen, solicits orders in this State not to become binding until sent to and approved by the home office, is not "doing business in this State" within the meaning of the statute (L. 1901, ch. 538) forbidding a foreign stock corporation, or its assignee, doing business here, from suing here upon a contract made here unless it has first procured from our Secretary of State a certificate of authority, as described in the statute. Jones v. Keeler, 221.

2. *Keeping and exhibiting a stock book — Refusal of inspection — Peremptory mandamus.*— Within the Stock Corporation Law (L. 1892, ch. 688, § 53, as amd. L. 1897, ch. 384, § 3) requiring every foreign stock corporation "having an office for the transaction of business in this State" to keep therein a stock book and have it open for stockholders' inspection daily during business hours, an office of the stock transfer agents of such a corporation maintained in the city of New York is one "for the transaction of business in this State" and there the corporation must deposit and exhibit the book and may be compelled to do so by mandamus. A "refusal" to permit a stockholder inspection is sufficiently made out where the transfer agents or those in charge of that office have for a month met, with evasive answers only, the stockholder's repeated demands for an inspection. People ex rel. Miles v. Montreal & Boston Copper Co., 282.

See **Injunction; Railroads; Supplementary Proceedings; Trusts.**

COSTS.

1. *City Court of the city of New York — After notice of trial, where a disagreement is followed by a verdict — Mileage.*— Only one item of costs, after notice of trial, can be taxed in the City Court of the city of New York where the jury disagree upon the first trial and find a verdict upon the second. Prospective mileage cannot be taxed as sheriff's fees where there is no proof that mileage will amount to any sum whatever. Hakonson v. Metropolitan St. R. Co., 182.

2. *On a new trial had "pursuant to an order granting the same" — Code Civ. Pro., § 3251, subd. 3.*— A plaintiff, who withdraws a juror upon the first trial and, after having the case restored by an order to the day calendar for trial at a subsequent term, succeeds on the second trial, is not entitled, upon the theory that a new trial has been had "pursuant to an order granting the same" (Code Civ. Pro., § 3251, subd. 3), to tax twenty-five dollars for all proceedings after the granting of and before the new trial, as the order restoring the case to the day calendar is the only order granted since the withdrawal of the juror and that cannot be deemed an order for a new trial. Bloch v. Linsley, 184.

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COSTS — Continued.

3. *On a discontinuance after the parties have settled the action between themselves.*— Where the parties to an action settle it between themselves and the attorneys for the defendant, after having been refused by the attorneys for the plaintiff a discontinuance without costs or further time to plead, are compelled by the conduct of those attorneys to interpose an answer alleging the settlement and to file a note of issue and serve a notice of trial, the subsequent motion of the plaintiff's attorneys to discontinue without costs will not be granted except on payment of the defendant's costs and disbursements of the action and of the motion. Himberg v. Rogers, 190.

See **Criminal Law; Foreclosure; Reference; Trial.**

CRIMINAL LAW.

1. *Allowance to counsel assigned in a capital case — Code Crim. Pro.*, § 308 — *Mandamus to enforce a legal right.*— The right of the trial court to compensate counsel, assigned in a case where the indictment charges an offense punishable by death, is not confined by Code Crim. Pro., § 308, to such defendants as appear for arraignment without counsel, and the trial court may lawfully compensate counsel who appeared at the arraignment and were assigned afterwards but before the commencement of the trial. Where a judge of the General Sessions of the Peace, in which the case was tried, has refused to act upon the application for compensation solely upon the ground of a lack of power, the Supreme Court will, by a peremptory mandamus, compel him to act thereon and this because mandamus is the proper remedy where some legal right has been refused or violated and there is no other appropriate legal remedy. People ex rel. Acritelli v. Foster, 19.

2. *Capacity of a child, aged eleven years, to commit a crime — Malice — Penal Code*, § 19.— A boy aged eleven years cannot lawfully be convicted of manslaughter in the second degree, for having thrown from a roof a brick which killed a person below, where the People give no affirmative proof upon the trial that the boy had capacity to understand his act and knew that it was wrong. Under the maxim that malice supplies age, the proof of malice must be strong and clear. People v. Squazza, 71.

3. *Remission of forfeiture of bail — Practice in New York city — Penal Code*, § 597.— No statute limits the time for making a motion for a remission of the forfeiture of an undertaking for bail. In the city of New York the remission is governed by Penal Code, § 597, which, as it now stands, was passed subsequent to, and is not controlled by, the Consolidation Act (L. 1882, ch. 410, § 1482). The certificate of the district attorney, described in said section 1482, is not now a prerequisite to such an application. Where it appeared, from the moving papers in such a matter, that the prisoner, after giving bail, defaulted in 1886, that he returned to the jurisdiction in 1890, that he again gave bail, that in 1890 the district attorney had the indictment dismissed for lack of evidence and, by the affidavit of an assistant district attorney in office from 1886 to 1889, that the people lost during his term no rights by the escape, the court remitted the forfeiture, which had been directed when the prisoner defaulted. Matter of Sayles, 135.

4. *Certificate of reasonable doubt as to a conviction of murder in the second degree — Erroneous charge as to homicide — Insistence of the trial court upon a verdict.*— A proper case for the issue of a certificate of reasonable doubt as to whether a judgment should stand convicting a defendant of murder in the second degree in having, after attempting to pry open a window in the night time in the rear of a house to commit burglary, and while trying to escape through the rear yards of the block, killed some ten minutes later a man who was trying to prevent him from escaping by a fire escape on the rear of another house on the opposite side of the block, is presented where the trial judge refused to instruct as to manslaughter, and charged that at the time of the homicide defendant was attempting to commit a burglary, although

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CRIMINAL LAW — Continued.

he had desisted therefrom and was fleeing. The conduct of the trial judge, in twice sending for the jury without their having asked for any instruction or having communicated with the court, and in volunteering to further instruct and help them, and telling them that a disagreement would be a miscarriage of justice, and urging upon them the expense of the trial as a reason for agreeing, and other like considerations, considered a further reason justifying a certificate of reasonable doubt. People v. Young, 256.

5. *Motion in a capital case for a new trial for newly discovered evidence — Code Crim. Pro.*, § 465, *subd.* 7.— A motion for a new trial of a capital case for newly discovered evidence cannot be granted unless there is a reasonable presumption that the reception of the evidence upon the trial would have changed the verdict rendered. New proof, tending to show that an accomplice of the defendant, the principal witness for the prosecution, had sworn falsely when he testified that he had never been convicted of a felony, held insufficient for a new trial. New evidence of two tramps and criminals, impeaching the accomplice's statement that he was with the defendant at the place of and almost up to the moment of the murder and tending to show that the defendant could not have been within forty-five miles of the place of the murder when it was committed, rejected as fabricated. New proof by affidavit, that ten days after the murder the accomplice admitted having committed it, rejected as incredible. People v. Sullivan, 308.

6. *Oppression; Penal Code*, § 556 — *Duty of police in New York city.*— The crime of oppression is made out, *prima facie*, by the deposition of a complainant showing that he keeps a retail cigar store in New York city, that a police captain and three patrolmen — not exhibiting any warrant — came into his store, that some of them remained there during business hours for eleven days, that they refused to leave, and that their presence hurt his business. People v. Summers, 384.

See **Indictment; New Trial; Statute of Limitations.**

DAMAGES.

1. *For a passenger's delay.*— A lawyer, delayed by a railroad wreck and who has not informed the carrier of special circumstances which make it necessary for him to reach his destination on schedule time, can recover of the carrier merely compensatory damages — the value of his time, during the period of delay, based upon the average of what he had earned for at least a year preceding the time of the occurrence. Cooley v. Pennsylvania R. R. Co., 239.

2. *Double.*— The defendant must pay all costs, but need not pay damages awarded the plaintiff for the value of the use and occupation of the premises nor double damages awarded for willfully withholding them. Barson v. Mulligan, 470.

DEATH.

Presumption of — Evidence — Common-law rule.— At common law seven years' absence of a person without intelligence concerning him rebuts the presumption of a continuance of his life and raises a presumption of his death. Letters of administration are in and of themselves *prima facie* evidence of the death of the person on whose estate they are granted. Ruoff v. Greenpoint Savings Bank, 549.

DECEDENTS' ESTATES.

See **Citation; Executors and Administrators.**

DEMURRER.

See **Pleading.**

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DEPOSITIONS.

1. *Taken within for use without the State — Power of nonresident commissioner to act here — Code Civ. Pro.*, §§ 914, 915, 919.— It is not an objection to the validity of a subpœna, duly issued by the Supreme Court of the State of New York upon a commission issued by a foreign court to take testimony within the State of New York for use without that State in an action pending in the foreign court, that the commissioner named is not a resident of this State and is a resident of the foreign State. The commissioner derives all his authority from the foreign State and court and when he comes here to act we recognize by comity his authority and selection. Our Legislature may by law enforce attendance before any person named by the foreign court. Matter of Canter, 126.

2. *Examination before suit — Refused in First Department where its purpose is merely to discover some one to sue.*— In the First Department an examination before suit should not be granted to enable a person, who alleges that he has been injured by a libel printed in a newspaper, to ascertain from one, said to be in control of it, who its proprietor is, and this although it appears that in two actions of libel already brought by the applicant, after research and inquiry, against the witness and a corporation whom the applicant deemed editors or proprietors of the newspaper, answers were served by them denying that they were such. Such an examination will not be granted in the First Department unless the applicant's moving affidavit names definitely the proposed defendant and shows a cause of action against him and in favor of the applicant. Matter of Singer, 561.

3. *Examination before trial — As to alleged fictitious sales of stock.*— Where customers of stock brokers sue them to surcharge their accounts rendered, as containing items representing fictitious transactions, and the said accounts do not show who the buyers and sellers were and the moving papers of the customers allege that the information cannot be obtained except from the stock brokers, the customers are entitled to examine them before trial upon this material point as otherwise the customers could not refute any statement which the stock brokers might make on the trial in regard to the pretended purchases and sales. Caldwell v. Labaree, 564.

DEVISE.

Remainder — When vested.— The will of William Shaw, proved in 1884, devised to his son William G. the use of a certain farm known as the Turner farm, excepting two lots of which one was the hay barn lot, until his death and thereupon devised the fee equally to his children living at the time of his decease. In another clause the testator directed the hay barn lot to be used in connection with his homestead farm for ten years after his decease and further directed that it thereafter revert and be used and pass like the Turner farm. William G. had one daughter Bertha, who died before his death in 1901 but after the testator, and she left a child now surviving. Held, that the devise to William G. did not lapse by his death without children of his body and become divisible among all the testator's children, but that Bertha took a vested remainder which upon her death passed to her child. That the ten years' devise of the hay barn lot postponed enjoyment but did not suspend title or the power of alienation. Shaw v. English, 37.

DISCONTINUANCE.

See **Costs.**

DIVORCE.

1. *Filing the interlocutory judgment — Code Civ. Pro.*, § 1774.— An application for a final judgment cannot be granted in an uncontested action for a divorce unless it appears that the interlocutory judgment was filed in the office of the county clerk more than three months before the application. Filing the interlocutory judgment with the clerk of a particular Part of the

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DIVORCE — Continued.

Supreme Court is not filing it with the clerk of the court, the county clerk. That the interlocutory judgment was signed more than three months before the application is not sufficient. Rothstein v. Rothstein, 101.

2. *When the interlocutory judgment may be made final — Code Civ. Pro.*, § 1774.— The date of the entry of the interlocutory judgment, and not that of the filing of the referee's report, establishes the day from which is to be reckoned the three months after which a judgment for a divorce may be made final, unless for sufficient cause the court in the meantime shall have otherwise ordered. Gibson v. Gibson, 103.

3. *Past-due foreign alimony collectible in this State.*— A decree, rendered in a court of a sister State, having jurisdiction, made after personal service upon a husband of copies of the subpœna, libel and notice to appear or answer, divorcing the parties and requiring him to pay his wife alimony in certain sums at certain periods, has the effect of establishing in her favor in the State of New York a judicial debt of record which the Constitution of the United States requires our courts to recognize and which entitles her to recover at law in them past-due and unpaid installments of alimony. Moore v. Moore, 162.

DOMICILE.

Residence — Change of.— A testator, who had lived for forty years in Troy, Rensselaer county, went to Saratoga, in April, a place where he spent his summers. He made a will there in June in which he was described as of Troy and in August made another will there in which he was described as of Saratoga. The latter will gave a woman of Saratoga, with whom he had boarded for many years when visiting there in summer, all his property provided she took care of him for the rest of his life. He also requested and paid for an addition to her house so that he could have a warm and comfortable room. He expressed to several persons an intention of living in Saratoga for the rest of his life. He died there in September. Upon an attempt to prove the June will in Rensselaer county, Held, that he died a resident of Saratoga county. Matter of Golden, 544.

EASEMENT.

Right of way — Adverse enjoyment — Presumption of a grant.— Where the owner of a tract of land, having highways on two sides of it, continuously maintains for nearly thirty years a passageway across the tract for access from his dwelling-house on the tract to the said highways, his two sons, between whom his will divided the tract, take their shares burdened with the artificial arrangements which he created, and a person claiming under the son who received the dwelling-house cannot be restrained from use of the entire passageway by a person claiming under the other son. An uninterrupted and open enjoyment of the passageway by the defendant and his predecessors for twenty years and more raises a presumption of a grant and this presumption becomes conclusive when it is not rebutted. Winne v. Winne, 435.

See **Title.**

EJECTMENT.

See **New Trial.**

ELECTION.

See **Transfer Tax.**

ELECTIONS.

See **Towns.**

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EMPLOYER'S LIABILITY LAW.

Existing rights to recover for injuries not taken away — Complaint.— The employer's liability law (L. 1902, ch. 600) did not take away, whether or not causes of action had accrued thereon, rights existing under the Labor Law (L. 1897, ch. 415, § 18), for a violation of the provision forbidding an employer to furnish his employee an unsafe scaffold, nor did it take away any similar rights existing at common law. L. 1902, ch. 600 merely extended the liability of an employer. A complaint for employers' alleged negligence, in so erecting a scaffold that a plank in it gave way and caused the death of a bricklayer by precipitating him to the ground, is not made demurrable by failing to allege that notice of the accident had been given his employers, as required by L. 1902, ch. 600, § 2. Gmaehle v. Rosenberg, 267.

EQUITY.

Quasi partnership arising out of a joint adventure and contribution — Accounting and dissolution.— Where persons, owning valuable exclusive privileges in certain copyrights and plates, agree with a bookbinder for the manufacture in part from them of certain works intended to be published by these persons during a term of years, they to contribute the privileges, sell the books at fixed rates, turn over the receipts to him and from them be repaid what they had paid for the privileges, he to furnish the labor and material, each party to account to the other and have a certain share in the net profits, the parties are to be deemed joint adventurers and quasi partners occupying fiduciary relations, and hence where the bookbinder, after receiving and using the privileges and receipts, refuses to render monthly accounts as agreed and his books are seriously questioned and the parties disagree, a court of equity will direct a dissolution and compel him to account. Bradley v. Wolff, 592.

See **Fraud.**

ESTOPPEL.

See **Master and Servant.**

EVIDENCE.

1. *Parol.*— Parol evidence is inadmissible to contradict a sealed instrument. Finck v. Bauer, 218.

2. *Admissibility and proof of admissions.*— Admissions which a party to an action made upon a former trial thereof are admissible against him upon a second trial as declarations against his interest. They may be proved by the stenographer's minutes of the former trial, as embodied in the return on a prior appeal, where the judge who conducted that trial has certified that the minutes are correct. Admissions on a former trial may be proved by a person who heard them made. Egyptian Flag Cigarette Co. v. Comisky, 236.

3. *Presumption that a check was given to pay a debt — Rebuttal — Entries against interest — When declarations of a person since deceased may be contradicted — Trustee.*— The legal presumption arising from the giving, on Jan. 15, 1898, by a trustee, since deceased, named Frederick C. Train, to his wife, Mary B. Train, of a check for $2,500 to her order on the funds of the estate is that he gave her the check to pay a debt of that amount, but a successor trustee may rebut the presumption where he sues her for the amount of the check as representing a loan to her from the estate. Memoranda in the handwriting of Frederick, found among the papers of the estate consisting of, what proves to be, a list of its assets, showing an entry "M. B. T. June 15th, 1898 2500" and also consisting of, what appears to be, a list of debts, due the estate, containing the same entry, are admissible on the part of the plaintiff as admissions of Frederick against his own interest and rebut presumptively the presumption that the check paid a debt. Griffen v. Train, 290.

4. *Impeaching one's own witness.*— Where a passenger of a street railway company sues it for damages for personal injuries alleged to have been sus-

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EVIDENCE — Continued.

tained by him by the starting of its car before he had had time to alight from it and the conductor thereof, when called by the defendant, corroborates the plaintiff's statement, the defendant cannot subsequently prove by the conductor his hostility to the defendant, a prior inconsistent statement made by him and a report he made to the defendant, and, by others, how the report came to be made, what the custom was in such matters and how and why the conductor had been discharged by the defendant — and this because such evidence is not admissible as relating to the issues of the controversy and the defendant cannot show inconsistent statements of its own witness, and inconsistent facts, for the purpose of impeaching him. Conklan v. Metropolitan St. R. Co., 619.

See **Criminal Law; Death; Pleading; Verdict; Warehouseman; Will.**

EXCISE.

See **Liquor Tax Law.**

EXECUTION.

Against the person — Place of his incarceration not his "residence" — Code Civ. Pro., § 1489.— A judgment debtor whose last place of sojourn within the State of New York, before being sent to the Elmira Reformatory in Chemung county, was the city of New York, cannot, while incarcerated, be deemed a resident of Chemung county and therefore an execution issued to that county during such period against his property and returned unsatisfied does not, within Code Civ. Pro., § 1489, entitle the judgment creditor subsequently to issue an execution against his person to the county of New York, now and formerly "the county where he resides", no execution having ever been issued to that county. American Surety Co. v. Cosgrove, 262.

See **Arrest.**

EXECUTORS AND ADMINISTRATORS.

1. *Assets in the hands of one, named executor, before the death of his testatrix — Interest and commissions.*— Money, which a person received from a woman upon the day before her death when she made her will and nominated him her executor, remains, where he claims no gift, her money and is. in his hands, assets to be distributed according to the will. Where he, upon the day of her death, deposited the money in his own bank account and spent it before her will was proved, the surrogate charged him with the fund, less disbursements, and legal interest but did not refuse him commissions because of such deposit. Matter of Brintnall, 67.

2. *Removal of executor for cause.*— It is a sufficient ground for the removal of a sole surviving executor that he has neglected and delayed the administration of the estate and has filed a verified petition in bankruptcy in which he has stated that he is a bankrupt. Matter of Truesdell, 336.

3. *Storage of goods before probate — Unnecessary legal services.*— The account of the executor of a contested will should not be surcharged with the difference between the rent of the apartment, in which his testatrix died and in which, pending the contest, he allowed her goods to remain, although he might have terminated the lease at once, and the smaller sum it would have cost him to store them in a warehouse, where it appears that the contestant alleged that the main provision of the will was void and the executor unfit to administer the estate. An executor cannot employ counsel to perform trust duties which the executor can do without such assistance. Matter of Murray, 433.

4. *Presumption in favor of executor's account — May employ his son as agent to collect rents — Compromise of claim.*— In attacking an executor's account and administration the burden of proof is upon the contestant and

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EXECUTORS AND ADMINISTRATORS — Continued.

where he fails to produce any direct proof of careless or imprudent conduct upon the part of the executor full faith and credence should be given to the acts of the latter. An executor, having five houses to rent, or sell when the market justifies it, may employ his own son to collect the rents provided the son's compensation does not exceed the customary rates for such services. An executor should be allowed what he paid a *bona fide* claimant against, and legatee of, the estate, in settlement of her claim, where the money he paid her made a saving to the estate. Matter of Wagner, 490.

5. *Administrator's failure to enter deficiency judgments — Errors of his attorney — Confusion of estate moneys — Commissions, etc., refused.*— The failure of an administrator to enter deficiency judgments in actions of foreclosure instituted by him does not create a personal liability upon his part where it appears that the judgments, if entered, would have been worthless. An administrator is liable to the estate for errors in foreclosing made by his attorney, at least to the extent of the estate moneys which the administrator paid to rectify the errors. Where the administrator confuses money of the estate with other moneys, cannot presently separate them, and has permitted the widow of the intestate to draw from a joint account running to her and him moneys which belonged to his estate, the administrator is liable for the loss. The court refused him commissions, costs and referee's fees. Matter of Hayes, 500.

6. *Revocation of letters for cause.*— The surrogate removed an administratrix for not trying to sell the fixtures and lease, of a liquor store of her intestate husband, which had five months to run, for letting these fixtures be sold under a chattel mortgage and be bought in by her bartender, who gave a new chattel mortgage, and for assisting him in procuring a renewal of the lease in his name that he might continue the business in her interest — the surrogate deeming these acts breaches of the trust duties which she owed her husband's creditors. Matter of Heyen, 511.

7. *Claim for services to a decedent — Construction of "expenses of the administration".*— A claim against the estate of a decedent for services alleged to have been rendered him must be rejected where there is no proof except by the claimant that he ever agreed to pay for them, where no payment of them was ever demanded of him, and where during the period of alleged service the claimant paid board to him and did not set the board off against the claim now alleged. Under a legacy of a sum of money in bank, less the cost of tombstones "and the expenses of the administration of my estate", the latter phrase is to be construed as covering all such expenses except commissions and the transfer tax. That tax must be apportioned where there are several legatees. Matter of Pray, 516.

8. *Liability for money received in another capacity — Code Civ. Pro.*, § 2596. — Where a man dies intestate and leaves a daughter, Hattie, his sole next of kin, and she dies intestate and leaves only a son and the administrators of the man, there being no interfering rights of creditors or any other rights, pay Hattie's interest in her father's estate, without appointment of an administrator for her estate, directly to the general guardian of her son, his father, upon the ground that the son is her sole next of kin, the payment is valid and the general guardian thereafter holds the money as the property of the son; and therefore where the general guardian is subsequently appointed one of Hattie's administrators, he cannot be compelled to account under Code Civ. Pro., § 2596, for the money, as it never was a part of Hattie's estate and never came into his hands as her administrator. Matter of Maybee, 518.

9. *Executor cannot speculate in claims against his estate — Expenses of collecting agent — Commissions, etc., refused.*— An executor cannot be permitted to retain a profit which he made by speculating in claims against the estate of which he was executor. Where he used estate moneys to prosecute

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EXECUTORS AND ADMINISTRATORS — Continued.

his speculations, procured assignments of the claims to be made, for less than their face value, to his dummy and afterwards charged them in his account as paid in full, he was deemed guilty of actual fraud and his account was surcharged with the profit he made. While an executor may employ another, even his own son, to collect claims against the estate the burden is on the executor to prove that the services and disbursements of the collector were rendered and made and both must be reasonable. The surrogate refused this executor commissions and costs and charged him personally with the costs of the proceeding for an accounting. Matter of Rainforth, 609.

See **Statute of Limitations; Trusts; Will.**

EXPRESS COMPANIES.

Limitation of liability for freight — Failure of shipper to state value — Unexplained loss from ordinary negligence — Knowledge of contents of receipt.— The acts of shippers of freight in filling out, in their own book of the blank freight receipts printed by an express company, a receipt, describing the freight, the consignee and his address, and tendering it at their store to an employee of the company for his signature, is an offer upon their part of a special contract of their own creation and where he signs and returns it to them a special contract results whose conditions bind the principals. Where the receipt stipulates that the company shall not be liable for damages resulting from certain specified causes unless proved to have resulted from the fraud or gross negligence of the company or its agents and that in any event the holder of the receipt shall not demand beyond the sum of $50, at which sum the property shipped is thereby valued, unless otherwise expressed in the receipt, and the shippers make no statement of the contents or value to the employee and he in their presence stamps the package "Value asked and not given", they can recover no more than $50 where the loss of the freight, although unexplained by the express company, resulted from ordinary negligence, unaccompanied by any affirmative wilful act. It is not material, in the absence of fraud or deception, that the shippers did not know the contents of the receipt — the express company having the right to assume the shippers' assent to the terms of the receipt from their acceptance of it. The rule in "freight cases" distinguished from the rule in "baggage cases". Bernstein v. Weir, 635.

FEES.

See **Costs; Foreclosure.**

FINE.

Voluntary payment made under a mistake of law not recoverable — Duress. — A voluntary payment of a fine made under a mistake of law cannot be recovered. General allegations of duress are insufficient where there is no allegation or proof of facts constituting duress. Harrington v. City of New York, 165.

FIRST DEPARTMENT.

See **Depositions.**

FORECLOSURE.

Referee's fees in New York county — Commissions — Compensation where the action is settled before any sale — Auctioneer not entitled to fees on adjournments.— The fees of a referee, appointed to sell in an action of foreclosure triable in the county of New York, are governed solely by the Consolidation Act (L. 1882, ch. 410, § 1088). The referee is also entitled to commissions and these are fixed by Code Civ. Pro., § 3297. The total of his fees and commissions cannot exceed fifty dollars unless the mortgaged property sold for ten thousand dollars or upwards. Where the owner of the equity of redemption pays the judgment after the printing of the notice of sale but before sale made, the referee is not entitled to any commissions and is entitled to no fees under the Consolidation Act except for receiving the order of sale and posting

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FORECLOSURE — Continued.

the notices thereof and for adjourning the sale, not exceeding three times. There is no statutory authority for paying the auctioneer fees for adjournments of the sale and no such disbursement can be allowed the referee. Harrington v. Bayles, 388.

See **Specific Performance; Mechanic's Lien.**

FOREST, FISH AND GAME LAW.

Complaint for a penalty need not refer to the statute nor need the summons refer to it, by indorsement, where the complaint is served with it — Negativing exceptions to the statute — Penalty additional to punishment for the misdemeanor — Presumption from possession of birds in the forbidden season — Construction of amendatory act, L. 1901, *ch.* 91, §§ 30, 33.— It is unnecessary in an action to enforce a penalty under the Forest, Fish and Game Law to recite or refer to the statute in the complaint. It is sufficient to allege facts bringing the case within the purview of the statute. Where the complaint is served with the summons it is not necessary to indorse a reference to the statute upon the summons. The Forest, Fish and Game Law, as amended by chapter 91 of the Laws of 1901, contains no exception which requires that, in an action to enforce a penalty under section 39 thereof, the complaint allege that the case is not within any saving clause of said act. The expression "and is liable to a penalty", in section 39 of the act, means that in addition to the criminal liability the offender subjects himself to a civil action for a recovery of the penalty prescribed. The presumption of a violation of the statute, arising from the possession of the birds specified therein in the forbidden season, is as true as a rule of pleading as it is as a rule of evidence. Sections 30 and 33 of the amendatory act cannot be reconciled. Section 33 is applicable to birds for which there is no open season, and in order to create an offense thereunder it must appear not only that birds in the possession of the alleged offender are wild birds but also that they are birds for which there is no open season, while section 30 relates only to birds for which there is an open season except from May first to August thirty-first, both inclusive. People v. Bootman, 27.

FRAUD.

1. *Promise which the promisor never intended to perform — Husband and wife.*— A promise to do a future act, intended to induce and inducing the promisee to part with his property, if made by the promisor with no intention of performing, constitutes actionable fraud. A complaint, by a man living apart from his wife, in which he alleges that she, in order to induce him to convey to her his farm, falsely promised to return to him and cohabit with him during the remainder of his life, that he conveyed in reliance upon the promise, that she made it to defraud him of his farm, and that she did not keep the promise or intend to keep it when she made it, states a good cause of action for setting aside the conveyance to her. Jones v. Jones, 360.

2. *Equity — Duty of fraudulent agent to account to principal — Discovery or notice of the facts of the fraud — Statute of Limitations.*— Where the plaintiff, the financial backer of a corporation and interested in it as creditor, bondholder and stockholder, having become involved requests the defendant its president to procure financial aid for it from a capitalist and the defendant subsequently and in 1893 induces the plaintiff to transfer all his stock to him upon the false statement that the capitalist requires the transfer as a condition of rendering such aid, equity will on the ground of fraud compel the return by the defendant of such of said stock as stands on the books in his name, or in the names of his nominal transferees, and make him account for such of it as cannot be returned and for all dividends where the evidence tends to show that plaintiff neither discovered the facts constituting the fraud, nor was put on inquiry in regard to them, until 1898 and the action was begun in 1900. Slayback v. Raymond, 601.

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FRAUDULENT CONVEYANCE.

Action to set aside — Rights of bona fide transferee.— An action, by the assignee of a judgment against a firm, to set aside a transfer of a farm made by the partner, served, to his sister and to make the judgment a lien on fire insurance moneys which she received upon the loss of buildings on the farm, cannot be maintained where it appears that the other partner of the firm has paid the judgment, where the plaintiff has made no attempt to enforce payment from the firm assets, where he participated to some extent in the negotiations which led up to the alleged fraudulent transfer, and where the sister paid some consideration for it and also assumed certain obligations against the farm. If she took the transfer in good faith, to help her brother, she would, upon a retransfer, be entitled to be repaid her advances and whatever else she had obligated herself to pay. If she had an insurable interest in the property and the insurance was taken out for her benefit, it would belong to her. Nichols v. Nichols, 9.

GUARDIANS.

Of the person — Notice to father — Refusal to appoint him — Religious training of infants.— Where, upon petition and without notice to the father of the infants, their aunt was appointed guardian of their persons, the surrogate vacated the order because the father had not had notice although entitled to it. The surrogate appointed the grandmother temporary guardian and would not appoint the father because he had been guilty of petit larceny and intoxication, nor the mother because she had become an incompetent. The surrogate held that the children must be brought up as Catholics, the religion of their father and also of their mother, although when the aunt was appointed guardian the children were in a Protestant institution by consent of the mother. Matter of Jacquet, 575.

HIGHWAYS.

See **Easement.**

HOMICIDE.

See **Criminal Law.**

HUSBAND AND WIFE.

Married woman not liable for medical services rendered the family.— A married woman is not liable for medical services rendered to her husband and his family unless in the first instance she pledged her personal credit to pay for the services. Hazard v. Potts, 365.

See **Attorneys; Fraud.**

INDICTMENT.

Of the head of a New York city department for letting a contract over $1.000 to a bidder not the lowest — Statutory construction — L. 1892. ch. 677, § 31; 1897, ch. 378, § 419; 1901, ch. 466, § 419.— An indictment found under the charter of the city of New York (L. 1897, ch. 378, § 419) of the head of a city department for letting a contract over $1,000 to a bidder other than the lowest, in a case where the head of the department has not rejected all bids and the board of public improvements has not determined that it is in the public interest to accept a bid other than the lowest, would, under the rule that unless a contrary intent appears the striking from a statute of a provision essential to support an indictment under it makes it inoperative as to offenses committed before the later act, ordinarily be nullified by the repeal by the amended charter (L. 1901, ch. 466, § 419) of the words "board of public improvements" and the substitution therefor of the words "board of estimate and apportionment", and this because there is not now in existence any board of public improvements whose prior consent to such a letting is now required. The indictment is, however, saved by the declaration of the Statutory Construction Act (L. 1892, ch. 677, § 31) that all criminal proceedings, commenced under a statute repealed and pending immediately

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INDICTMENT — Continued.

prior to the repeal, may be prosecuted to final effect in the same manner as they might if such provisions were not repealed. Section 31 of the Statutory Construction Act is applicable to all legislation passed after it. There is nothing in the amended charter of 1901 to show a legislative intent that said section 31 should not apply to section 419 of the charter of 1897. The amended charter, in substance, expressly declares that the new section 419, substantially the same as the old one, is to be deemed a continuation of the old one. The charter makes the price the test of bids, and therefore the court cannot consider the question whether the higher bid the fire commissioner unlawfully accepted may not prove the lowest because of the better quality of the article furnished thereby. It cannot be held that there was no lowest bidder merely because each of two bidders bid the lowest price offered. People v. Scannell, 297.

INFANTS.

See **Criminal Law; Guardians; Statute of Limitations; Trial.**

INJUNCTION.

1. *Stockholder's action against a foreign corporation for an accounting — Effect, on the issue of an injunction, of denials.*— Where it appeared, in an action brought by a stockholder of a foreign corporation to compel it and its directors to account, that, for no sufficient reason, the plaintiff had been denied access to the books, that although the defendants had, at the last annual meeting of the stockholders, declared the corporation solvent, attachments, reducing it to insolvency, had been levied immediately after the meeting, that it was insufficiently denied that the directors, acting as such, had been dealing in the stock of a mining company to the detriment of the corporation, and further, that they were unable to account for all its stock, there being a discrepancy as to the amount of stock which should be in the treasury, the court granted, as to directors and as to property within the jurisdiction, an injunction restraining them *pendente lite* from disposing of any stock in their names or under their control or covered by a certain pooling arrangement, but refused any injunction which should interfere with the exercise by the foreign corporation of its charter powers. Where affirmative matter, set up by the defendants, negatives, by necessary deduction and inference, their own denials, the latter fall to the ground and the court can test the truth by the defendants' affidavits without seeking it from the allegations and denials of the moving and opposing papers. Moneuse v. Riley, 110.

2. *To restrain a police department from exhibiting or publishing the photograph and measurements of a suspected criminal — Right of privacy — Libel.*— Mandatory injunctions are rarely allowed on an interlocutory application and then only in extreme cases where the right thereto is established with indisputable clearness and where the final result may otherwise fail to afford complete relief. A person, arrested by the police force of New York city upon suspicion of having committed a crime and whose photograph and Bertillon measurements were then taken by the department, cannot have it ordered by mandatory injunction to destroy or surrender the negative, all copies, and the record of the measurements. He cannot have the department restrained from exhibiting or publishing them upon the ground that a trespass was committed against him when he was compelled to sit for his photograph, as that trespass is past. He cannot have such relief upon the ground that his right of privacy has been invaded, for no such right exists in the State of New York. Injury to his character and reputation constitutes nothing more than a libel and the publication of a libel cannot be restrained by injunction. His remedy, if any, is at law. Owen v. Partridge, 415.

3. *Delaying a public work to enforce private rights.*— McCabe and Brother, subcontractors, under general contractor McDonald, for sections 13 and 14 of the Manhattan subway, appointed, with McDonald's consent, one Hunt as

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INJUNCTION — Continued.

superintendent of the McCabe contract. McCabe, having summarily discharged Hunt and declared his own contract with McDonald terminated, wished to remove the plant, when Hunt, who claimed that his contract of employment with McCabe made him his partner, declared an intention of carrying out the contract and alleged an interest in the plant as a partner. McCabe obcontinue the injunction, that Hunt should be restrained from carrying out McCabe's contract and also restraining McDonald and the Rapid Transit Subway Construction Company from carrying out any contracts made between McDonald and McCabe through Hunt as McCabe's agent or superintendent. The court, having found Hunt not a partner of McCabe, held on a motion to continue the injunction. That Hunt should be restrained from carrying out McCabe's contract. That, as between Hunt and McCabe, the latter owned the plant and was entitled to remove it, exercising care and speed, but that he must not remove any part of the plant essential to preserve the work until a reasonable time had elapsed for the substitution of another plant. That the order to be entered must contain nothing preventing McDonald from proceeding with the work under other contracts he might thereafter make therefor or from employing Hunt on the work or from contracting with him for it. McCabe v. Hunt, 466.

4. *To restrain Masons from trying a member — His pending criminal trial — His status.*— A Mason indicted for libel cannot procure a continuance of an injunction restraining his fraternity from trying him, prior to his trial for libel, upon charges involving the same acts where there is no support for his allegations that the trial commissioners of the fraternity are biased and that he believes the Masonic charges and proposed trial are measures taken and intended by the fraternity to prejudice his criminal trial. The injunction cannot be supported upon the ground that the Masonic proceedings may take from the plaintiff property without due process of law as a Mason has no severable right in the property of his fraternity so long as it is in existence, his existing rights being limited, providing he is a member in good standing, to using its property in the manner it prescribes. Franklin v. Burnham, 566.

See **City of New York; Labor.**

INSURANCE (ACCIDENT).

Presumption of payment of premium — Waiver of proofs of death — Limitation of the right to sue — Policy when construed favorably to the insured.— Possession by the insured at the time of his death of a policy of accident insurance raises a presumption that he had paid the premium. The insurer's immediate repudiation of any liability under the policy excuses compliance by the beneficiary with a condition antecedent to a recovery that proofs of death must be furnished within two months of the date of death. A proviso of the policy that "No legal proceedings for a recovery hereunder shall be brought within three months after the receipt of such proofs at the office of said Association, nor at all unless begun six months from the date when said Association shall have received such proof" must be strictly construed; and cannot, where service of proofs of death has been thus excused, be deemed a limitation of the time to bring an action. An insurance policy, when susceptible of two constructions, must be construed in the way most favorable to the insured. Cole v. Preferred Accident Ins. Co., 260.

INSURANCE (FIRE).

Breach by his principals of a contract requiring them to insure "use and occupancy" — Meaning of the phrase — Broker's profit on rebates.— Where an insurance broker sues merchants for the alleged loss he sustained by their failure to comply with so much of a contract (authorizing him as agent to insure their buildings, stock, fixtures, etc., for not less than the market value for a term of years at a uniform rate per annum of one dollar on a hundred and pay the premiums) as required them to insure "use and occupancy," he

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INSURANCE (FIRE) — Continued.

is entitled to nominal damages where it appears that they did not insure "use and occupancy." The phrase "use and occupancy" refers to the business use of which the property is capable in its existing condition and does not include either profits of the business or the salaries of two salesmen whom the defendants employed by the year. Under such a contract, where running policies of the standard form are cancelled by the insurers and the premiums paid are retained by them *pro rata* only, the defendants cannot counterclaim against the agent the difference, in the amount of the rebates, between what they would have been upon the basis of a dollar a hundred, the contract rate, and what they were on the basis of the lower rate paid by the broker and named in the policies, and this because when he delivered the policies to the defendants his liability ceased and they thereupon assumed direct contractual relations, with the insurers, binding them to accept on cancellation whatever the policies stipulated. **Tanenbaum v. Simon, 174.**

INTEREST.

Money paid, laid out and expended.— Where subcontractors agree to but fail to furnish, for bridge tower foundations, granite from a quarry cut, to a certain extent, to required size and shape, and the contractor notifies the subcontractors' surety of the default, offers to allow it to furnish the granite, procures a number of bids from dealers, submits them to the surety and accepts the lowest bid, the contractor is entitled, where the contract stipulates that upon the subcontractors' failure to perform the contractor may procure the required stone elsewhere and recover the difference between the contract price and the excess cost, to recover as against the surety that cost as money paid, laid out and expended for the subcontractors and the contractor is also entitled to interest thereon. **Degnon-McLean Construction Co. v. City Trust Safe Deposit & Surety Co., 530.**

JOINT DEBTORS.

Action against — Compromise with one and recovery of the balance against the other — Code Civ. Pro., §§ 1942, 1946.— In 1901 the plaintiffs, as executors, sued Weisberg and Minden, as partners, although they had dissolved partnership in 1899, upon a lease, made them as partners by the testator, for rent and water rates payable under it. Minden having applied on the trial to amend his answer and for a stay, the court severed the action on the plaintiffs' motion and they, in Nov., 1902, recovered judgment against Weisberg for $950.81 and in satisfaction and compromise thereof accepted of him $500. The plaintiffs then served a supplemental complaint and demanded and recovered herein, in Dec., 1902, of Minden $450.81, the balance of the judgment. He appealed. Held, that Weisberg and Minden were joint debtors as well as partners between themselves, and that, within Code Civ. Pro., §§ 1942. 1946, the plaintiffs could compromise with Weisberg without releasing Minden from the residue of the demand or precluding a continuance of the action against him. That the judgment against Weisberg did not preclude the plaintiffs from compromising. **Siefke v. Minden, 631.**

JUDGMENT.

See **Divorce; Res Adjudicata.**

JUDICIAL SALE.

Purchaser need not complete where the validity of the title depends upon a disputable question of fact.— A purchaser upon a judicial sale should not be compelled to complete where the validity of the title depends upon a question of fact the proof as to which, made on the application, might be changed on a new inquiry or is open to opposing inferences. He should not be compelled to complete unless it is clear beyond a reasonable doubt that he will receive what he contracted to buy. **Stephens v. Flammer, 278.**

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JURISDICTION.

1. *Lost by "holding open" a matter — Contempt of an order — Code Civ. Pro.*, § 2471*a*.— A county judge who, after having made an order under Code Civ. Pro., § 2471a, requiring a person, appointed to fill an alleged vacancy in an office, to surrender its books and papers to a claimant, by election, of the office, is restrained by the Supreme Court from the further hearing of the proceeding, cannot, without communicating or making any note or entry of his determination, "hold open" the proceeding for twenty-four days and until the restraining order has been vacated and then, without notifying the said appointee, or his counsel, of the resumption of the proceeding, proceed to "inquire into the circumstances", and thereafter, there being no appearance for the appointee or any opposition, commit him to jail until he delivers the said books and papers or is discharged according to law. The county judge by "holding open" the proceeding, and not adjourning it for a definite time as required by Code Civ. Pro., § 2471a, loses jurisdiction. It is a fatal defect where neither the order directing commitment nor the commitment describes definitely the books and papers which the appointee is required to deliver. People ex rel. Stryker v. Van Bergen, 139.

2. *Municipal Court of the city of New York — Jurisdiction lost by a justice unless he files his decision within fourteen days.*— A justice of the Municipal Court of the city of New York loses jurisdiction of an action therein unless he renders judgment therein, and also files his decision, within fourteen days of the final submission of the action. Van Valis v. Charcona, 226.

See **Divorce; Municipal Court of New York; Summary Proceedings.**

LABOR.

Injunction — Reinstatement in a labor union.— Upon a motion to vacate an *ex parte* temporary injunction enjoining a labor union from treating the plaintiff (whom it had expelled for being, contrary to its rules, a member of the National Guard and with whom it refused to work) as not a member of the union and from refusing to grant him full membership and a full membership card, it appeared that the plaintiff had entered the union as an apprentice, that he never had received any card other than an apprentice card, that he never had been paid the wages of a journeyman, and that the notice of expulsion did not mention his status in the union. It further appeared that the union denied that he had ever been a full member or had had such a card. Held, that, under the rule that one seeking relief by injunction must show himself clearly entitled thereto, the injunction must be vacated. Potter v. Sheffer, 46.

LACHES.

Code Civ. Pro., § 382, *subd.* 5.— No question of *laches*, in the strict sense of that term, can be involved in an action brought under Code Civ. Pro., § 382, subd. 5 and particularly where the parties have not changed their positions. Slayback v. Raymond, 601.

LANDLORD AND TENANT.

See **Lease; Summary Proceedings.**

LEASE.

Deposit for security.— A deposit applicable by the terms of a lease, for four years and ten months' rent payable monthly in advance, "first to any deficiency which may occur on her (the tenant's) part in the performance of the covenants of this lease should there be any, and, if not, then as payment of the rent of the last three months of the term of this lease" cannot be applied, at the tenant's instance, to a default of hers, in paying rent, which occurred in the fourth month after she took possession, and the deposit must be held as security until the last three months of the term begin to run, when it will become applicable to those months. Brill v. Schlosser, 247.

See **Summary Proceedings.**

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LIBEL.

Complaint — If plaintiff select and complain on a particular meaning for the words he is bound by it and cannot on the trial fall back on another meaning — Special damages.— In libel the plaintiff may always avoid a meaning of which the words complained of are susceptible by confining his complaint to a particular meaning of them, but he is bound by the meaning he selects and if he fails on it he cannot fall back on the general meaning of the words. No special damages are alleged in a complaint unless the items thereof are alleged. Martin v. Press Publishing Co., 524.

See **Injunction.**

LIQUOR TAX LAW.

1. *Resubmission of local option questions refused.*— The neglect of a town clerk to publish in the proper county newspaper, for five days before a town election, a notice that the local option questions would be then submitted to the voters is not a sufficient reason for setting aside the election and ordering a resubmission of the questions where there is proof that the clerk's neglect has caused no prejudice and a full vote has been had. Matter of O'Hara, 355.

2. *Recount — Parties to resubmission — Practice — Order therefor — Errors of election officials when disregarded.*— Where hotel proprietors of a town apply to set aside the canvass and return of the votes cast at a town meeting upon the excise questions and for a resubmission of them, the court will not order a recount where that would be useless and impossible — it appearing that since the election the town clerk's office has been burglarized and the ballot box broken open with evident evil design. The town board, being the canvassing board, is a proper party to such a proceeding as a board and its members are proper parties as individuals and will be allowed to intervene. In view of the provisions of the Liquor Tax Law (L. 1901, ch. 640, § 3) that no special town meeting for a resubmission shall be called until a petition therefor and an order of the court thereon has been filed with the town clerk, the filing with him of such a petition is not a condition precedent to an order for resubmission. Where all the excise questions, except the pharmacist proposition, have been decided adversely to the selling of liquors and by majorities which cannot be overcome by counting the ballots in the manner most favorable to the propositions, the court will not set aside the canvass and return, for errors or illegal acts of the election inspectors in relation to the return and some of the ballots. Matter of Bertrend, 536.

3. *Procedure for revocation.*— The unconstitutionality of the amendment made in 1900 (ch. 367, § 9) to subdivision 2 of section 28 of the Liquor Tax Law, requiring the holder of a liquor tax certificate when brought into court for alleged violations, to file a verified answer tendering an issue or suffer revocation of his certificate, does not nullify the whole scheme of revocation provided by said subdivision 2 but leaves unimpaired the procedure as established by that subdivision in its original form. The court held an answer unnecessary but ordered a reference to take proofs and report. Matter of Cullinan, 583.

4. *Rate of tax in a part of the borough of The Bronx under L.* 1903, *ch.* 115. — The provisions of subdivision 7 of section 11 of the Liquor Tax Law, as amended by L. 1903, ch. 115, § 1, declaring that "The excise taxes assessed under this act in cities containing a population of fifteen hundred thousand or more, which are or shall be formed by the consolidation of territory situate in one or more counties, shall be assessed in the several boroughs or portions of the territory so consolidated to form such city at an advance of one-half in the rate over the amount at which such taxes were assessed on the thirty-first day of December, nineteen hundred and two, in the several portions of the territory so consolidated" govern the future rate of said tax in that part of the borough of The Bronx which was originally annexed to the city and county of New York as a part of the first judicial district — a district in

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LIQUOR TAX LAW — Continued.
which heretofore a uniform rate has prevailed — and the population test of subdivision 1 of said section 11, which would justify a lower rate, is inapplicable thereto. People ex rel. Gress v. Hilliard, 589.
See Agency; Constitutional Law.

LOCAL OPTION.
See Liquor Tax Law.

MALICIOUS PROSECUTION.
Probable cause.— Where there is no dispute about the facts of an action for malicious prosecution the question of probable cause for the arrest is one of law for the court. Where the plaintiff, although an overseer of highways, unnecessarily, without authority or notice, and against the defendant's protest, tears down his fence bounding a highway, the defendant has a right to assume that the act was malicious and unlawful. His failure to prosecute the plaintiff, after causing his arrest, does not show malice or want of probable cause for the arrest at the time when it was made. O'Dell v. Hatfield, 13.

MANDAMUS.
See Abatement and Revivor; Criminal Law; Supreme Court.

MARRIED WOMEN.
See Husband and Wife.

MASTER AND SERVANT.
Complaint for wages, alleging performance — Excuse for nonperformance.— Where a person, hired in 1901, by a corporation, now insolvent, for five years at a yearly salary payable in equal weekly installments, sues for salary unpaid for twenty-three weeks and pleads the contract in its effect and alleges that he has "duly performed all the conditions thereof on his part," his complaint should not be dismissed upon the theory that he has alleged, and has not proved, performance for five years, for the complaint must be deemed to allege performance only during the time for which he sued. Where the servant is to be, but is not, paid weekly, his abandonment of the service does not estop him from recovering what he has earned. Tichenor v. Bruckheimer, 194.

MECHANIC'S LIEN.
1. *Foreclosure of — Filing lien necessary to a personal judgment — Code Civ. Pro.*, §§ 3403, 3412.— In an action to foreclose a mechanic's lien a personal judgment against the contractor cannot be obtained by his immediate subcontractors unless they have filed a lien. Where the assignee of lienors under subcontractors has a suit pending in the Supreme Court to foreclose the lien, in which the contractor is a defendant, and it appears that neither his immediate subcontractors, nor their trustee in bankruptcy, made a party defendant, have ever filed a lien for a debt due by him to them for another action brought against him at law by the trustee in another court for the same debt must be denied by the Supreme Court because the trustee, for failure to file a lien, could not recover in the Supreme Court action any personal judgment against the contractor and, therefore, the relief obtainable, in the two actions, by the trustees is not the same. Nussberger v. Wasserman, 120.

2. *Insufficient notice of lien.*— A statement, in a notice of mechanic's lien, that "(4) The labor performed and the materials furnished and to be furnished consists of wainscoting, closets * * * and the agreed price and value thereof is $611.86 dollars 611.86 less amount allowed for material. (5) The amount unpaid to the lienor for such labor (or) (and) materials is $603.61 six hundred and three and 61-100 ($603.61) dollars. (6) The time when the first and last items of work were performed and materials furnished, is first delivery December 9, 1901, last delivery January 17, 1902, within ninety days last past", creates no lien under the Lien Law (L. 1897, ch. 418,

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MECHANIC'S LIEN — Continued.

§ 9) as it cannot be determined therefrom whether the claim is for labor performed and materials furnished or for labor performed and materials to be furnished nor is there any item showing whether labor has been performed. Bossert v. Happel, 569.

MORTGAGE.

See **Statute of Limitations.**

MUNICIPAL CORPORATIONS.

1. *Its right to reclaim and remove a sidewalk for which the abutting owner would not pay.*— Where an assessment, proper in amount for a flagged sidewalk in a village is resisted by the grantee of an abutting lot, is void because made as against the "estate" of her grantor, and is never corrected, relevied or collected in any way, the village, when charged by its charter, through its trustees, with the care and custody of village property and empowered to lay sidewalks and levy an assessment for the cost, may reclaim and remove the sidewalk. The village does not lose dominion or control of its materials by placing them on the street in question. Platt v. Village of Oneonta, 42.

2. *Viaduct erected by statute for a "street use" — Consequential damages to easements not recoverable by abutting owner.*— Where a municipal corporation acting under and in accordance with a statute erects, upon and over a street of which it owns the fee, a viaduct for the public benefit and to carry the street at a higher level, the viaduct is lawful as an erection for a "street use" and the Legislature has power to authorize it without providing compensation to property owners affected thereby. An abutting owner who has thereby suffered consequential damages to his easements of light, air and access can recover no damages of the city as he must bear his loss as an incident to the welfare of the community. Sauer v. City of New York, 585.

See **Supreme Court.**

MUNICIPAL COURT OF NEW YORK.

1. *Its jurisdiction does not extend to an action on a quasi contract.*— The jurisdiction conferred upon the Municipal Court of the city of New York, by its charter (L. 1901, ch. 466, § 1364, subd. 1) and thereby confined to an action for breach of contract, express or "implied," does not give that court jurisdiction of an action to recover of the city a fine imposed upon the plaintiff by a city magistrate who had no jurisdiction to impose the fine. If such an action is maintainable it must be upon the theory of a *quasi* contract and of such an action that court has no jurisdiction and takes none under the word "implied." Harrington v. City of New York, 165.

2. *Time within which judgment must be rendered.*— In an action in the Municipal Court of the city of New York begun before, but tried after, the Municipal Court Act (L. 1902, ch. 580) went into effect on Sept. 1, 1902, the justice has fourteen, and not eight days, after the final submission of the action, within which to render judgment. Wallace v. Harris, 216.

3. *Jurisdiction — Construction of L.* 1902, *ch.* 580, § 25 — *Removal to proper district.*— Although subdivision 5 of section 25 of the Municipal Court Act (L. 1902, ch. 580) requires an action, for a penalty for a violation of an order of the department of health of the city of New York, to be brought in the court district in which the violation happened the provisions of subdivision 4 of said section, permitting the action to be tried where brought unless upon or before joinder of issue the defendant demands a transfer to the proper district, lead to the conclusion that jurisdiction is not affected by bringing the action in a district other than the one in which the violation occurred. Unless the defendant demands a transfer upon or before joinder of issue the right of removal is lost and the judgment stands. Department of Health v. Halpin, 243.

See **Appeal; Arrest; Removal of Cause; Summary Proceedings.**

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NEGLIGENCE.

In starting a street car — Passenger holding on to hand-rail after the car started — Conduct of her escort in an emergency — Intervening superseding cause.— A street car conductor is guilty of negligence where he without any warning starts his car while a young girl, who has grasped the hand-rail with her right hand and has one foot on the step of the car, is trying to board it. It is not negligent for her to keep hold of the hand-rail, where the car is proceeding rapidly, even though it causes her to be dragged half a block. The fact, that her escort, who had been running after the car, then caught up with it and drew her from it, does not, if his negligence be imputed to her, make her negligent as matter of law, although he may not have exercised the best judgment in the emergency, and this rule is particularly applicable where it appears that substantially all her injuries were on her right side and were caused by her clinging to the hand-rail with her right hand. The jury, and not the court, must determine whether any of her injuries were due to her escort's act, whether he acted rashly, and also whether his act amounted to an intervening cause superseding the effect of her own negligence, if any. Schoenfield v. Metropolitan St. R. Co., 201.

2. *Intervening act of third parties as the proximate cause of a collision.*— The act of little boys, in turning the starting lever of an electric truck left standing at rest in a public street by its operator with the power off and the brake on while he was making a delivery of goods to a customer, thereby causing the truck to start down the street, uncontrolled, and collide with a horse and wagon, must be deemed the proximate cause of the collision, and, as the intervening act of third parties, exempts the owner of the truck from liability to the owner of the horse and wagon. Berman v. Schultz, 212.

See **Employer's Liability Law; Evidence.**

NEGOTIABLE INSTRUMENTS.

Accommodation indorser — Recovery where there is a material alteration.— The fact that the payee's indorsement of a promissory note was forged does not excuse one, who subsequently indorsed the note for accommodation of the maker, from liability to a subsequent indorsee and holder in due course who was compelled to take the note up before maturity and who had it protested for nonpayment. A holder in due course of a negotiable instrument, who was not a party to an alteration made therein without the assent of all the parties liable thereon, may enforce payment thereof according to its original tenor. Packard v. Windholz, 347.

See **Payment.**

NEW TRIAL.

1. *Ejectment — Terms — Code Civ. Pro.*, § 1525.— A second new trial in ejectment is a matter of favor but will be granted where the defendant's defeat on the first new trial may have turned upon questions of pleading and of the order of proof which may be obviated on the next trial by an amendment of the answer and a strict compliance with the rules as to the introduction of evidence. Barson v. Mulligan, 470.

2. *New trial for newly discovered evidence.*— New evidence of the good character of the defendant is not a sufficient ground for granting him a new trial for newly discovered evidence, and where he fails to meet any of the conditions requisite in such a case his application must be denied. People v. Walker, 521.

See **Costs; Criminal Law.**

NEW YORK CITY.

See City of New York.

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NONSUIT.

Practice in the Municipal Court where the plaintiff fails to prove his cause. — A plaintiff, who does not prove his cause of action in an action in the Municipal Court of the city of New York, should be nonsuited, but it is erroneous for the court to render a judgment for the defendant. Egyptian Flag Cigarette Co. v. Comisky, 236.

NUISANCE.

Trespass — Legislative authorization cannot out off damages — English rule distinguished.— The rule in England that no damages or redress can be obtained in the courts for a nuisance, or for any structure or use of real property, which does direct injury to private property, provided parliament has authorized the same and has not provided compensation for such injuries, does not and cannot exist in this country. The English rule is founded on the unrestrained and unlimited power of parliament to take or damage private property at will without compensation, whereas, in this country, our legislatures are under constitutional restraints in respect of individual rights of property. The restraints of Magna Charta in favor of individual rights are upon the crown only; they never were and are not upon parliament. The distinction in respect of "direct" and "consequential" injuries pointed out, the latter being *damnum absque injuria* under the general rule of damages. The owner of a Brooklyn building, situate between the East river and the entrance to the New York and Brooklyn bridge, lower than it by eighty feet and distant from it southerly twenty feet, upon the roof of which dirty water and slush, containing solid matter, fall or are blown from the bridge, flooding the roof by clogging the leaders from it and hitting against the northerly side of the building and its windows, is entitled to compensation from the city of New York, the owner of the bridge, as for a direct injury to private property and the facts that the location and use of the bridge have been authorized by the legislature and that it has made no provision for compensation for such injuries are not material. Sadlier v. City of New York, 78.

See **Pleading.**

PARTIES.

Leave to withdraw answer and answer over.— Where one of the defendants in an action of ejectment, after succeeding on a motion to strike from the complaint as irrelevant certain allegations giving a history of the title and of claims and disputes existing in regard to the land for many years between various persons, answers the complaint as it stood after the striking out, and thereafter the decision of the Special Term is reversed on appeal and the matter stricken out reinstated upon the ground that codefendants of the moving defendant had not been made parties to the motion and that as against them the matter stricken out was essential, the moving defendant should be allowed to withdraw her answer and be given a reasonable time to answer the complaint as reinstated and also to require the plaintiffs, who had the information but refused to furnish it, to furnish her with information concerning her codefendants so that she may bring them into court and have it determined whether they may not properly be stricken out as defendants having no interest in the land. Brown v. Fish, 573.

See **Certiorari.**

PARTNERSHIP.

1. *Limited — A failure to file proof of the publication of the certificate and affidavit imposes no liability.*— A failure to file, with the proper county clerk, proof of the publication of the certificate and affidavit, required by the Partnership Law (L. 1897, ch. 420, §§ 30, 31, 32) to be made, filed and published in the case of a limited partnership, does not make a special partner therein a general partner, and this because the statute imposes no penalty or liability for the failure, and besides it cannot prejudice creditors. Buckle v. Iler, 214.

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PARTNERSHIP — Continued.

2. *Dissolution because one partner excluded the other — Money judgment as an incident to equitable relief — Apportionment of a bonus for being taken into a law patnership.*— Where a lawyer of experience takes a young lawyer as a partner in consideration of a bonus or premium and thereafter excludes him from a knowledge of the details of the business and treats him with discourtesy, the younger lawyer may bring an action for a dissolution and in it the court may award him a money judgment for his share of the bonus, but this money judgment results only from the exercise of equitable jurisdiction in determining whether there should be a dissolution. The bonus or premium should in such case be apportioned on the basis of the actual and of the agreed duration of the term, the senior partner to retain *pro tanto* for the time elapsed, the junior partner to be repaid the balance. Hoyt v. Easton, 264.

3. *Not created by an interest in net profits given as compensation for services — Equitable relief refused.*— A person who accepts employment from a firm of subcontractors as their general superintendent, he to receive an annual salary and additionally one-third of the net profits of their contract including one-third of the plant so far as the same has been paid for out of the proceeds of their contract, and who accepts and uses a power of attorney to open bank accounts for the firm and deposit and draw out their contract moneys, and who is nowhere described in the contract of employment as a partner except that, as superintendent, he is to have full power over the work "as if he were an active partner", cannot be deemed a partner of the subcontractors and, therefore, where the continuing subcontractor declares the subcontract at an end, because of a dispute with the general contractor, and summarily discharges the superintendent, he is not entitled to a continuance of a temporary injunction restraining, upon the ground of his interest in the plant, the subcontractor and other parties in interest from interfering with or removing it — his remedies being confined to an action against the subcontractor for a wrongful discharge or to damages for the latter's breach of the contract of employment. Hunt v. McCabe, 461.

PARTY WALL.
See **Brokers.**

PAYMENT.
By creditor taking, after default on a chattel mortgage, and retaining the chattels.— Where, after a vendee has given his vendor a promissory note for goods sold as well as a collateral chattel mortgage upon them, the vendor takes them, after default and under the mortgage, and instead of selling retains them, there is a payment of the debt to the extent of their true value, and if that exceeds the face of the note it is not enforcible. Groh's Sons v. Feldman, 303.

PENAL CODE.
§ 19. People v. Squazza, 71.
§ 556. People v. Summers, 384.
§ 597. Matter of Sayles, 135.

PLEADING.
1. *Demurrer to complaint for insufficiency.*— Upon a demurrer to a complaint upon the ground that it does not state facts sufficient to constitute a cause of action, the question is not whether it contains redundant or irrelevant matter but whether it contains averments which go to make up a complete cause of action. A demurrer admits the truth of all the facts stated in the complaint. Every intendment and inference which can be derived from the complaint must be used to sustain it. Budd v. Howard Thomas Co., 52.

2. *Complaint for breach of promise, with seduction — Pleading conditions precedent — Code Civ. Pro.*, § 535.— A complaint by a woman alleging that

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PLEADING — Continued.

for a promise of $50.000 she released a man, since deceased, from all claims on account of or arising out of his having seduced her under promise of marriage and from "any other action which this plaintiff then had or might have had" is not demurrable by his executors on the ground that a woman can have no cause of action for her seduction, for, the clause as to "any other action which this plaintiff then had or might have had" may be taken to mean an action for a breach of the promise to marry, with seduction as an element of damage. Where the plaintiff has pleaded generally the performance by her of conditions precedent she may properly add an allegation of something else which she agreed to do and which she did. Cowen v. Rouss, 105.

3. *Amendment of the complaint changing the nature of the cause of action.* — Where a person seeks, but fails, to make out a case against executors and trustees for their alleged negligence as trustees in not keeping in a safe condition a grating, near a sidewalk in front of their premises, covering an excavation into which she fell, the court should not allow him to amend his complaint upon the trial so as to charge a nuisance, a different cause of action, and permit him to recover as for that. Moniot v. Jackson, 197.

4. *Insufficient defenses in confession and avoidance.*— Affirmative defenses, in the nature of pleas in confession and avoidance, are bad where they confess nothing and admit only hypothetically. Where such defenses insufficiently deny the allegations of the complaint it must, on demurrer, be taken to be true and the defenses in view of their admissions, be held insufficient to avoid liability. Saleeby v. Central Railroad of New Jersey, 269.

5. *In answer to a complaint on an insurance policy — Implied condition therein that all material representations of fact are true — Limiting effect of the rule as to parol evidence.*— In the absence of any express provision in the contract of insurance on the subject, there inheres in every insurance policy an implied condition that all material representations of fact, made by the insured to induce the risk and relied upon by the insurer, are true. Therefore, for the insurer to plead, in answer to a complaint on a policy, a breach of this implied condition is sufficient (instead of pleading fraud or mutual mistake) to enable proof to be made of such misrepresentation. The rule first above stated is limited and may be affected by the general rule that parol evidence is inadmissible to enlarge, vary or contradict the terms of a written instrument. Evans v. Columbia Fire Ins. Co., 316.

6. *Defense not demurrable for not containing denials.*— Denials of allegations of the complaint being no part of a defense it cannot be held bad on demurrer for not containing denials. Leonorovitz v. Ott, 551.

See **Animals; Contract; Employer's Liability Law; Libel; Parties.**

POLICE.
See **Criminal Law; Injunction.**

PRINCIPAL AND AGENT.
See **Agency.**

PRINCIPAL AND SURETY.
See **Agency.**

PROMISE.
See **Consideration; Fraud.**

PUBLICATION.
See **Citation.**

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RAILROADS.

Lapse of an option to construct — Illegal gift by a municipality to the railroad of a part of the cost of paving a street.— A street railroad corporation must be deemed to have lost an option to construct a railroad in a city street where many years, since the last extension of the option, passed without action upon its part, where it stood by and let another railroad corporation acquire the franchise in the street, where, when, seven years later, it merged that corporation into its own, it operated that portion of the road under the purchased franchise until it reconstructed that portion, and where it procured the consent of the municipality to such construction. Where a street railroad corporation is legally bound to pave between its tracks and for two feet on either side of them, the municipality has no right or power to agree with the corporation that it shall be liable to pay only one-fifth of the expense of such paving. The consolidations which resulted in the existing Binghamton Railroad Company and the contract made between the city of Binghamton and two of the constituent companies did not relieve the Binghamton Railroad Company from its statutory liability to pay the entire expense of paving, on East Court street in said city, between its tracks and for two feet outside of them. Kent v. Common Council, 1.

See Title.

REFEREE.

See Forclosure; Reference.

REFERENCE.

To determine an attorney's compensation upon a substitution — Costs — Practice where the justice goes out of office.— A reference, to determine what compensation should be given the attorney in an action, ordered upon a motion for the substitution of a new attorney, is one merely for the referee to take testimony and report his opinion, in aid of the conscience of the court. The referee has no power to give the original attorney costs against his client; and where there are no costs there can be no extra allowance. The motion remains before the court, and where the justice who heard the motion goes out of office pending the reference, it is proper practice for the original attorney, or his counsel, to bring the matter again before the court by moving to confirm the referee's report in his favor. Frost v. Reinach, 412.

RELIGIOUS CORPORATIONS.

See Trusts.

REMOVAL OF CAUSE.

Municipal Court of the city of New York — Estoppel — Laches.— Within L. 1901, ch. 466, § 1366, and Code Civ. Pro., § 3216, a defendant waives his right to remove a case from the Municipal to the City Court of the city of New York only by obtaining an adjournment after issue joined; and, accordingly, such right is not lost where the defendant obtains, on the return day in the Municipal Court, an adjournment in order to join issue and make a motion to remove and on the adjourned day makes that motion. Where the plaintiffs subsequently serve a reply entitled in the City Court and in that court demand a bill of particulars they submit themselves to its jurisdiction and are thereafter estopped to move to remand the action to the Municipal Court, and particularly where they wait eight months before making that motion. Duke v. Caluwaert, 623.

RES ADJUDICATA.

Judgment on the merits on demurrer — Subsequent reversal by the Court of Appeals of the doctrine held below.— A judgment of the Supreme Court dismissing, on the merits and after a demurrer, a complaint on a contract upon the ground that the contract was illegal, the issue of validity having been directly involved, is *res adjudicata* in another action, between the same

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RES ADJUDICATA — Continued.

parties and upon the same contract, brought by the same plaintiff to recover a different item of damage thereunder. Where the plaintiff has never appealed from the judgment he must be deemed to have acquiesced in it, and cannot now take advantage of the fact that six years later the Court of Appeals, in another action but upon a similar contract, decided that a contract like the plaintiff's was legal. Hirshbach v. Ketchum, 306.

SALES.

Powers of a salesman.— A traveling salesman cannot bind his corporation by his promise to pay a person commissions on a sale to a third person provided the promisee will help the salesman to effect the sale. Jones v. Keeler, 221.

See **Contract.**

SAVINGS BANKS.

See **Trusts.**

SEDUCTION.

See **Pleading.**

SERVICE.

Impeaching marshal's return of personal service of summons and complaint.— A marshal's return, showing personal service of the summons and verified complaint upon the defendant, cannot be controverted by her affidavit that she was not served, and her affidavit forms no part of the record. Long Branch Pier Co. v Crossley, 249.

See **Citation.**

SERVICES.

See **Husband and Wife.**

SPECIFIC PERFORMANCE.

Defects in the appointment of a guardian ad litem in foreclosure.— In an action by a vendor for the specific performance of a contract for the sale of land which he had bought in, three years previously, upon a foreclosure of a mortgage which he had held upon the land, it appeared that on the day for closing the purchaser, defendant, had rejected the title upon the grounds that the foreclosure was defective in that the mother of an infant defendant, who she stated was aged fourteen, had petitioned for the appointment of a guardian *ad litem* for him instead of the infant's doing so himself, that although the venue of the guardian's affidavit was Westchester county it was verified before a New York city commissioner of deeds, that the guardian did not state therein that he had no interest adverse to the infant, and that the affidavit was verified before the petitioner's attorney. Eight days after the day for closing the vendor attempted to cure these defects by an *ex parte* order, amending *nunc pro tunc* the proceedings for the appointment of the guardian *ad litem*, changing the venue of his affidavit to the county of New York, making the petition of the mother recite that when she petitioned the infant was under fourteen, showing that the guardian had had no interest adverse to the infant and confirming the guardian's acts. Two days later the vendor again tendered the deed and it was rejected. Held, that the purchaser was justified in rejecting it. Baumeister v. Demuth, 22.

See **Title.**

STATUTE OF FRAUDS.

1. *Acceptance and receipt of shares of stock — Delivery.*— Transactions in shares of stock are within the Statute of Frauds. An oral contract by which stock brokers sell and agree to deliver three days later forty shares of a stock, which they then have, is void under the statute and not enforcible by the buyer where there was no note or memorandum of the contract, nor at the

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STATUTE OF FRAUDS — Continued.

time of the making of it any payment of any part of the price, or any delivery actual or constructive — an act necessary to an acceptance and receipt by the buyer. Nichols v. Clark, 107.

2. *New promise in writing to pay a debt discharged in bankruptcy — Action upon the old debt, maintainable.*— In an action for goods sold, it appeared that, after the defendant had filed a petition in bankruptcy and had scheduled the said debt, but before his discharge, he wrote upon the face of the plaintiff's bill, showing the balance due, and signed these words: "This account is O. K. August 22nd. I will pay it." Held, that, within L. 1882, ch. 324; L. 1897, ch. 417, § 21, subd. 5, the words quoted amounted to a new promise in writing to pay the debt, which had been discharged in bankruptcy. That the plaintiff might sue for the goods sold and need not sue upon or plead the new promise. Gruenberg v. Treanor, 232.

STATUTE OF LIMITATIONS.

1. *Reformation for mistake — A personal defense.*— An action to cancel a discharge of a mortgage, covering fifty acres and separately twenty-seven acres, and reform it so that it releases only the twenty-seven acres, brought upon the ground that the party executing the discharge intended to release and supposed she was releasing only the twenty-seven acres, is not barred by the ten years' Statute of Limitations nor until the said party has knowledge that she has made the mistake. Where the present owner of the fifty acres, made a defendant, is not in privity with the plaintiff and was not a party to the discharge, he cannot plead the statute and particularly where he had notice or knowledge of the existence of the mortgage on his parcel at the time when he acquired his interest. Perry v. Williams, 57.

2. *Compulsory accounting of executors — As affected by infancy — Code Civ. Pro.*, §§ 382, 396, 414.— The fact, that more than six years have elapsed since accrual of the right to compel executors to account, does not bar an infant legatee and heir-at-law of the decedent from having such a proceeding taken in her interest, and this because the time of the disability arising from her infancy is not a part of the six years and the statute has never begun to run against her. Matter of Pond, 65.

3. *Compulsory accounting — Code Civ. Pro.*, § 2727.— A motion to compel the executrix of a trustee to account to a successor trustee to the end that the latter be paid a judgment, which he recovered as trustee in an action brought against the executrix for an accounting of the trust, is a proceeding to recover a demand that was due and as such is not governed by the ten years' Statute of Limitations and is barred by the lapse of six years — in analogy to an action at law. Matter of Cruikshank, 325.

See **Fraud.**

STATUTES.

See **Appeal; Arrest; Auctioneers; Building and Loan Associations; Corporations; Employer's Liability Law; Foreclosure; Forest, Fish, and Game Law; Indictment; Liquor Tax Law; Mechanic's Lien; Partnership; Statute of Frauds; Supplementary Proceedings; Telegraph Companies; Towns; Transfer Tax; Will.**

STAY.

Of another action.— Although there is a substantial identity in the parties, subject-matter and issues of two actions brought respectively in the Supreme and another court, the Supreme Court should not stay the other action where there cannot be obtained in the Supreme Court action by a party entitled to relief the entire relief which he can obtain in the other action. Nussberger v. Wasserman, 120.

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STREET RAILROADS.
See **Railroads.**

STOCK.
See **Statute of Frauds.**

SUMMARY PROCEEDINGS.
1. *Verification of a petition by a domestic corporation — Code Civ. Pro.*, §§ 525, *subd.* 1; 2235 — *Jurisdictional defect in an allegation of the service of a demand for rent or possession — Code Civ. Pro.*, § 2240.— An agent of a domestic corporation may, and an officer thereof need not, verify its petition to initiate summary proceedings to dispossess its tenant. The said Municipal Court does not acquire jurisdiction of such proceedings where the petition therein, although stating that the tenant was served with a three days' notice to pay rent or yield possession "as prescribed in chapter 17, title 2, section 2240 of the Code of Civil Procedure, for the service of a precept," fails to state by which of the three methods, prescribed in said section, service was made. Matter of Stuyvesant Real Estate Co., 205.

2. *Notice to tenant — "Re-enter" construed — Jurisdiction.*— A notice served in summary proceedings by a landlord upon a tenant, in default for rent reserved in a lease, merely stating the amount due and that the relation of landlord and tenant has ceased and requiring the tenant to remove, is unauthorized as in such case the notice is required by Code Civ. Pro., § 2231, subd. 2, to be in the alternative, for payment of the rent or possession of the premises. A lease reserving to the landlord the right merely to "re-enter" on default entitles him to maintain ejectment against the tenant but not summary proceedings. A justice of the peace has no jurisdiction of an action of ejectment. McMahon v. Howe, 546.

SUNDAY.
See **Supreme Court.**

SUPERVISORS.
See **Towns.**

SUPPLEMENTARY PROCEEDINGS.
1. *Debtor having no existence in law — Construction of foreign statutes — Revocation of an attorney's authority.*— The Illinois statute of 1893, relative to an assessment life or accident insurance company, authorizing dissolution for insolvency and making no provision that the corporation might after dissolution be continued long enough to wind up its affairs, superseded the Illinois statute of 1874 providing that an insurance company might for such a purpose be continued for two years after dissolution. Therefore, where a creditor of an Illinois assessment life insurance company, reincorporated under said act of 1893, recovers and enters judgment against it in the State of New York after it has been dissolved in Illinois but within two years of the dissolution, she cannot take supplementary proceedings upon the judgment and examine here a third party as to property of the corporation alleged to be in the third party's hands and this because the corporation had no existence, in contemplation of law, when the judgment was recovered. The fact that an attorney, retained by the corporation before its dissolution, appeared for it upon the trial of the action, which the said creditor brought against it here, is not material as its dissolution revoked his authority to appear for it or bind it. Matter of Stewart, 32.

2. *When an attorney must disclose a client's communication — Code Civ. Pro.*, § 835.— Where, after the claim of a judgment creditor had accrued, the judgment debtor transferred his house, representing nearly all his property, to his wife for one dollar, and she borrowed money on the house and died and by her will made him her sole beneficiary for life, the court held that an attorney for the wife, who had received from her a considerable part of the money she borrowed on the house, must disclose to the unpaid judgment cred-

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SUPPLEMENTARY PROCEEDINGS — Continued.

itor why he received the money and what disposition had been made of it, and this because the attorney, upon receiving the money, became her agent or attorney in fact as to it and to that extent lost his privilege to refuse, under Code Civ. Pro., § 835, to disclose a communication made him by her, his client. The attorney cannot be excused from answering upon the ground that the money belongs to the wife's estate. Phoebus v. Webster, 528.

SUPREME COURT.

Will not ordinarily supervise matters of municipal administration.— The Supreme Court will not interfere by mandamus to compel the commissioner of public safety of a city of the second class to enforce the laws prohibiting the employment on Sunday of all labor, except for works of necessity and charity, and those prohibiting on that day all public exercises and dramatic and theatrical performances. Interference by the Supreme Court with municipal administration is not to be encouraged, and while the court may act it should do so only in extreme cases. People ex rel. Clapp v. Listman, 372.

SURROGATE'S COURT.

Decree — Collateral attack.— A legatee under a will will not be permitted, through an order to an executor to show cause why her legacy should not be paid, to make a collateral attack upon a decree, to which she was a party, settling the estate and deciding former objections, as to charges against her legacy, which she now seeks in this manner to renew. Matter of Stevens, 377.

See Citation; Guardians; Trusts.

SUSPENSION OF POWER OF ALIENATION.

See Will.

TAXES.

In New York city land taxes accruing before a testator's death are not a "debt" payable out of his personalty.— Taxes in New York city being a lien upon the particular property and not a personal charge against the owner thereof, an executor there cannot, although taxes on land of his testator have accrued before his death, pay them out of the personalty as "Taxes assessed on the property of the deceased previous to his death" (Code Civ. Pro., § 2719, subd. 2), and particularly where the executor is devisee of the land. Matter of Hewitt, 322.

2. *Residence.*— A person, taxed as trustee in New York city and county for personalty in 1901, and who claimed a residence in the town of Southampton, Suffolk Co., was physically present in that town on July 1, 1900, remained there until Oct. 1, 1900, then returned to Manhattan, New York city, and sojourned there with his mother, voted there in Nov., 1900, and was still there on the second Monday of Jan., 1901, when the "Annual Record" was opened for public inspection. Held, that he was properly taxed as resident in New York city and county in 1901. People ex rel. Beers v. Feitner, 368.

3. *Not collectible by action — Rochester.*— A tax is not a debt but is an impost, not founded on contract, or collectible by action except where there is express statutory authority. The city of Rochester, being afforded by its charter a complete system for the assessment, levy and collection of taxes, is confined to that system and can maintain no action at law to recover of a city taxpayer city taxes unpaid, in the absence of any authority therefor in its charter. City of Rochester v. Gleichauf, 446.

4. *Form of assessment against a nonresident partnership.*— An assessment against nonresident partners, for personal taxes, made in the firm name is void under the Tax Law (L. 1896, ch. 908, § 21, as amd. by L. 1899, ch. 712, § 3) as it governs and requires the assessment to be made against the partners as individuals. People ex rel. Dufour v. Wells, 553.

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TAXES — Continued.

5. *Assessment of the realty of a domestic corporation — L.* 1901, *ch.* 466, §§ 892, 893, 894.— An assessment duly made upon the real estate of a domestic corporation having its principal place of business in and owning real estate in the borough of Manhattan is valid and a lien upon the land where it has been entered in the "annual record of the assessed valuation of the real and personal estate of the borough", required to be kept by L. 1901, ch. 466, § 892, and the assessment need not be entered in the "annual record of the assessed valuations of real and personal estate of corporations", required to be kept by section 893 of said law, unless the city desires to collect the tax out of the personal property of the corporation. Statement of the distinction between the two "annual records". People ex rel. Manhattan Life Ins. Co. v. Wells, 555.

6. *Action to recover personal taxes — Detailed statement of personalty — Books kept open — Delay in delivery of rolls — Demand — Irregularities not prejudicial — Assessment when unassailable.*— Under the charter of the city of New York (L. 1897, ch. 378, § 889) it was not necessary in 1900 that a deputy tax commissioner should furnish the board of taxes and assessments with a detailed statement of the personal property of a person assessed. Where the city sues to recover personal taxes, it, within section 1526 of said charter, sufficiently proves that the tax books were kept open for examination and correction by proving the notice, that they were open, and publication thereof in the required papers. A delay of eighteen days in the delivery of the assessment-rolls to the receiver of taxes does not vitiate an assessment as the provision as to delivery contained in section 911 of said charter is directory merely. Where the city seeks to recover taxes of an individual a demand of payment is not under said charter or at common law a condition precedent to the action. He cannot escape liability because of alleged irregularities in the publication of notices required by sections 892, 914, 918 and 919 of said charter where he does not show that he was injured thereby. *Semble*, that, where a board of taxes and assessments and its subordinates have jurisdiction to act, an assessment made by them becomes unassailable where the party assessed has never sought to review it by certiorari. City of New York v. Watts, 595.

See City of New York; Title; Transfer Tax.

TELEGRAPH COMPANIES.

The addressee of a dispatch cannot recover the penalty imposed by L. 1890, *ch.* 566, § 103.— No action can be maintained under the Transportation Corporations Law (L. 1890, ch. 566, § 103) by the addressee of a telegraphic dispatch for the penalty imposed upon a telegraph corporation for its neglect or refusal to transmit such a dispatch with impartiality, good faith and in the order in which it is received, and this because the statute expressly limits the right of recovering the penalty to the sender of the dispatch, or one desiring to send it, and entitled to have the same so transmitted. Thompson v. Western Union Telegraph Co., 443.

TENEMENT-HOUSES.

See City of New York.

TITLE.

Specific performance — Easements as incumbrances — Duty to co-owner of land.— In the absence of any language to the contrary in an executory contract for the sale of lands, the law implies a right in the vendee to receive a good title free from incumbrances and defects. A right of way for a railway, and a right reserved to a railroad company, the original owner, to re-enter for the purpose of building the same, are easements running with the land and constitute in law incumbrances. Where the railroad company sells, with said reservations, and also binds its immediate grantee to pay the taxes due and to become due, a grantee of its grantee cannot, by permitting the lands to be sold for taxes and buying them in at the tax sale, cut off the title of

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TITLE — Continued.

the railroad company to its easements. A co-owner of land cannot purchase the title of a co-tenant where the purchaser has a duty to perform in regard to it, for such a purchase is inconsistent with his duty and the title which he thus acquires inures to the common benefit. Turner v. Walker, 379.

TOWNS.

1. *Contract for water-mains and sewers — L.* 1900, *ch.* 451.— A complaint, against a town, by contractors with commissioners of a town water district appointed by the town board under L. 1900, ch. 451, for damages for a breach preventing full performance of a contract for water mains and sewers, is not demurrable by the town upon the ground that the water district created by the act is a municipal corporation and this because the act confers upon the water district no powers of municipal government. The water district remains an integral part of the town; the town may lawfully incur indebtedness for the water system as a local improvement for the general welfare and may lawfully become primarily liable for the cost, although it is to be assessed ultimately upon the residents of a particular district of the town. The provision of the said act which confers upon the town board authority to appoint commissioners and, upon them, authority to execute the contract, is legal. The contract binds the town, although made in the name of the commissioners. The contract may lawfully provide for sewers as well as water mains. Holroyd v. Town of Indian Lake, 75.

2. *Vacancy in the office of a supervisor how filled — Repeal.*— A vacancy occurring in the office of supervisor of the town of Massena, St. Lawrence county, through the failure of the person elected to qualify, must be filled by appointment by the justices of the peace of the town and by the town clerk and not by an election held at a special town meeting. The Town Law (L. 1890, ch. 569, § 240) repealed L. 1890, ch. 252, providing for a special election in such case. L. 1890, ch. 252 is sufficiently designated in the repealing schedule annexed to the Town Law, and the Statutory Construction Law does not prevent the repealing clause in the Town Law from repealing L. 1890, ch. 252. People ex rel. Hyde v. Potter, 485.

See **Liquor Tax Law.**

TRANSFER TAX.

1. *Duty of an executor to testify as to assets of his testator — Contempt.* — Until it has been decided, or is conceded, that a decedent was at the time of his death a nonresident of the State of New York, an executor of his will is guilty of a contempt in refusing to answer, at an appraisal to fix the transfer tax upon his estate, questions as to assets thereof which would be taxable if he died a resident of this State but which would otherwise not be taxable. Matter of Bishop, 64.

2. *Law phrases unnecessary to create a bequest — Notice to grantee of the proposed taxation of his grant because conveyed to him in contemplation of his grantor's death.*— A statement in the will of a decedent directing his executor to "withdraw" one-half of the claims the decedent has presented to his brother's executrix, and further declaring that he "forgives" that half, amounts to a bequest of that half, does not relieve any part of the whole sum from taxation, but has the effect of making the tax on that half assessable to the executrix as such and not to her as an individual. A claim by the State that real property, alleged to have been conveyed by a decedent "in contemplation of death", has escaped taxation cannot be heard unless and until the grantee has had notice of the proceeding to tax it. Matter of Wood, 155.

3. *Nontaxability of a testamentary provision intended in possible substitution for an annuity created by the testator in his lifetime — Election.*— Where a husband has, through a trustee, agreed to pay his wife, in release of all her rights against him or in his estate, a life annuity accompanied by

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the option to her of demanding of his estate upon his death, in substitution, such gross sum, calculated upon her expectancy of life from and after the date of his death, as will discharge prospective payments of annuity, his creation by will in his executors of a trust to continue the annuity in case she refuses a gross sum, is not — failing her exercise of her election — taxable to her as to the *corpus*, for the will has transferred nothing to her and she has received no benefit under it. *Semble*, that the wife must exercise such an election immediately upon her husband's death and is not, after having received the annuity for some time thereafter, entitled then to demand a gross sum calculated as of the date of his death. Matter of Daniell, 329.

4. *Taxability of loans, made by a partner to his firm, constituting working capital — Profits left on deposit with the firm.*— Except as between the partners themselves, money which one of them loaned to the firm, which it used, and upon which he received ratably such profits as were earned by the firm, is invested capital and as such is subject to the transfer tax upon his death. Profits which he permitted to remain on deposit with the firm are to be deemed taxable assets of his estate. Matter of Probst, 431.

5. *Gift by a husband to a wife whom he survived — Intent of donor.*— In 1877 the husband, still living, of a testatrix transferred to her name firm profits which he had invested with his firm in a special account and he continued this practice until her death. He wrote a letter to his son and assigned as a reason for the transfer that "in case of any trouble in the concern I would have something for your mother and the children which cannot be touched by the creditors of the concern". After his wife's death all his children signed an instrument permitting him to treat the money as his own. After that one of the children demanded of his father an accounting of his mother's property and was paid by his father a part of it. Held, that the property belonged to the mother and was subject to the transfer tax upon her death. That there was no basis for the father's contention that the money should be treated like a deposit made in a savings bank by one person for another and that the trustee, having survived the beneficiary, was entitled to the money. Matter of Anthony, 497.

6. *Taxation of National bank stock of a nonresident — Such a corporation is domestic.*— Stock in a National bank, doing business in the State of New York, belonging to the estate of a nonresident decedent is subject to the transfer tax although the certificate of the stock was without this State when he died. Such a corporation organized under a Federal law is not a foreign corporation as to the State of New York but is a domestic corporation in each State in which it transacts business. Matter of Cushing, 505.

7. *Money paid to buy off a contestant of a will is not an expense of administration.*— Money paid a niece of a testator by proponents of his will to induce her to withdraw objections to the probate is not deductible from the transfer tax as an expense of administration and this because the payment was not made for the estate but was made by the beneficiaries, out of the property transferred to them, in satisfaction of their own contract obligations. Matter of Marks, 507.

8. *Good-will taxable.*— The Court of Appeals having held that the definition applicable to "property", as that word is used in the Tax Law (L. 1896, ch. 908, art. X), is contained in section 242 thereof and there declared to "include all property or interest therein", and the Statutory Construction Law (L. 1892, ch. 677, § 4) having defined "personal property" as including "everything, except real property, which may be the subject of ownership", the good-will of the business of a firm is taxable for the transfer tax where the decedent was the sole owner of the firm and his will transferred the business. Matter of Dun, 509.

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TRANSFER TAX — Continued.

9. Where a testator wills to his sisters and a nephew property of the value of $663.78, the share of the nephew, amounting to $291.31, is taxable under article X of the Tax Law because property of the testator of the value of $500 or over has been transferred to persons not specifically exempted from the transfer tax. Matter of Rosendahl, 542.

10. A testator left personalty, worth $500, and a farm, worth $6,200, to his widow and children but gave an uncle a life use, in the farm, worth $337. Held, that the life use of the uncle was not taxable because the property passing to the widow and children was specifically exempt from the transfer tax and, therefore, property of the testator of the value of $500 had not been transferred to any person. Matter of Garland, 579.

11. *Foreign bonds of a foreign testator which were here when he died and remained here as corpus of a trust he created.*— Foreign bonds, which a non-resident testator had in the State of New York when he died and which thereafter were kept here as *corpus* of a testamentary trust he created for the lives of his son and grandson, are taxable, when passing under his will and after their deaths to his collateral relatives, according to the transfer tax law in force when he died — in this case, L. 1885, ch. 483, as amd. by L. 1887, ch. 713. Matter of Gibbes, 581.

TRESPASS.
See **Nuisance.**

TRIAL.
Costs — Under the general answer of an infant.— The interposition, upon the part of an infant defendant, of a general answer to the complaint raises an issue which requires proof, the resulting inquiry is a trial for the purposes of costs to the infant, and the trial is none the less one because the witnesses thereat were not cross-examined in the infant's behalf. Wandell v. Hirschfeld, 527.

TRUSTEES.
1. *Not liable as such for his tort.*— Trustees, of an express trust in realty, charged with the duty of keeping the premises in repair, if liable at all for a failure to do so, can only be held as individuals. Moniot v. Jackson, 197.

2. *Liability of trustees for dangerous condition of their trust real estate.*— Testamentary trustees of an express trust, upon whom as trustees the will imposes the duty of keeping the trust real estate in repair, are liable personally, at least in the first instance, for a failure to do so. Gillick v. Jackson, 627.

See **Evidence; Trusts.**

TRUSTS.
1. *In personalty — Savings bank deposit — Proof of trust — Intention to create.*— Proof, by a transcript thereof, that a woman, who died in 1898, had, in 1880, a savings bank account which ran "in trust" for the plaintiff, and that, in 1882, the deposit was drawn out by a check, signed by her as an individual, referring to the savings bank-book by its number and payable to a third person, does not show that she created a trust for the plaintiff in the deposit, which sum is not a part of her estate, where there is no evidence that she herself made the deposit, or ever declared an intention to create such a trust, or ever had the savings bank-book, and where all the evidence in the matter comes from an official of the bank who did not become such until many years after the deposit and its withdrawal. Dickie v. Adams, 88.

2. *Savings bank deposit — When additional to a debt due the beneficiary from the depositor.*— Where a person, since deceased, opens an account "in

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trust" for one who is then his creditor, a trust, additional to the debt to the creditor, is created for the latter where it appears that the decedent intended to create a trust and did not intend it as a payment of the debt. Matter of Hewitt, 322.

3. *Construed by the law of the place of administration — Indefiniteness of foreign beneficiary.*— The validity of a trust in personalty created by the will of a domestic testatrix is to be determined by the law of the State where the trust is to be administered and, where that is a foreign State, our law (L. 1893, ch. 701) cannot be invoked to sustain the trust. Where a domestic testatrix, who died in 1899, made in 1880 a bequest to "Daniel P. Tuttle, Bishop of Utah, the Protestant Episcopal Missionary Bishop for Utah and Idaho, in his corporate capacity, and to his successor or successors in office", of a sum of money in trust to erect "within the limits of his episcopal jurisdiction" a church and rectory "to be the property of the aforesaid Protestant Episcopal jurisdiction", and it appeared that Tuttle ceased to be bishop of Utah and Idaho in 1886 and that before 1899 the territory of that diocese or district was divided among three others and that other territory from other States was taken in and that none of these districts had ever been incorporated, the court found no corporation in existence corresponding with "the aforesaid Protestant Episcopal jurisdiction", and declared the trust bequest unsustainable and that it was not saved by the law of Utah or Idaho or by the doctrine of *cy-pres* in Utah. Mount v. Tuttle, 456.

4. *Future estate — When vested.*— Where a testator devises and bequeaths his residuary estate, for two lives, to trustees, orders them to deem the *corpus* divided into a certain number of shares, directs them to collect the income and distribute it annually among named beneficiaries of these shares, and, after the lapse of the two lives, devises and bequeaths the *corpus* among the beneficiaries in such manner that the parties, theretofore receiving the income only, shall receive and become vested with the estate and property, out of which such income arose, in the same relative shares and proportions in which they were entitled to such income, and there is an absence in the will of any gifts over, words of survivorship, gifts to a class or to issue or to legal representatives, a beneficiary takes a vested interest in the principal of his share upon the death of the testator which he may devise before the expiration of the trust term. Ogden v. Ogden, 473.

5. *Commissions — Principal and income as between life tenant and remaindermen.*— Where a testamentary trust requires the payment of income semi-annually, the trustee is entitled to and should take his commissions semi-annually. As between the life tenant and remaindermen of a trust "to collect and receive the income and profits" of a fund, money realized by the trustee from the sale of rights and options, enabling him, or his testatrix, to purchase additional stock in a corporation, is principal. Money, received by him from the sale of dividend shares representing corporate earnings, is "income and profits." Money, representing the increase for which stocks of the testatrix were sold above their inventory value, is principal. Matter of Roberts, 513.

6. *Savings bank deposit — Intent of donor.*— Where it was agreed between a savings bank and the two daughters of an aged depositor, confined to her bed for many months by an accident and needing some of her deposit and not a party to the conversation, that her account should be changed on the books of the bank so as to run "in trust" for one of the daughters and this was done, the court held, in an action brought by the executor of the depositor against the bank and that daughter, that her mother had no intention of creating a beneficial interest for her in the money and that what was left of it belonged to the executor as such. Green v. Sutherland, 559.

7. *Words creating one — Res adjudicata — Surrogate may appoint a successor to a deceased testamentary trustee.*— A devise made by a testatrix to

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TRUSTS — Continued.

one of her executors of "the management and control of my real estate, with power to sell and convey same as I now possess (after my death)" creates an express trust and vests the legal estate in the trustee, subject only to the execution of the trust. A decree made on a judicial settlement of the executor, adjudging that he hold the balance in his hands in trust for the beneficiary named in the will, concludes parties to the decree as to the existence of the trust and as to how the executor now holds the *corpus*. Code Civ. Pro., § 2818, as amended in 1903, authorizes a surrogate to appoint a successor to a deceased testamentary trustee and therefore the Supreme Court no longer has exclusive jurisdiction in such case. Matter of Chase, 616.

See **Trustees; Will.**

USURY.

See **Building and Loan Associations.**

VENDOR AND PURCHASER.

See **Specific Performance.**

VERDICT.

Against evidence.— Where the overwhelming weight of evidence in an action brought against a railroad corporation by a person, not a passenger, for damages for having been kicked off the platform of a moving car of the corporation, as alleged, by an employee thereof, is opposed to the plaintiff's version of the affair, a verdict in his favor must be set aside as resulting from passion, prejudice or a misapprehension of the evidence. Johnson v. New York Central & Hudson River R. R. Co., 350.

VILLAGES.

See **Municipal Corporations.**

WAREHOUSEMAN.

Liability at law on his contract to insure goods stored and thereafter burned — Rule as to best evidence — Apportionment of insurance moneys when unnecessary.— Where materials to be manufactured are deposited with warehousemen in reliance upon their assurance that the materials will be insured against fire under existing general policies held by them, the owner of the materials may, upon their destruction by fire while in storage, recover at law of the warehousemen, *pro rata*, upon the basis of the insurance moneys they recovered for their entire loss where existing general policies paid them cover his property and exceed his loss. Where at least two paid policies, sufficiently describing the materials and exceeding their value, are in evidence, the rule requiring the production of the best evidence is not violated by admitting, upon the part of the plaintiff, the proofs under those policies, although they describe all the other policies not in evidence, nor is the rule violated by permitting one of the warehousemen to testify that they have all the policies. Where the warehousemen have thus received on the two policies money enough to pay the plaintiff, who sues for himself alone, the terms and conditions of the other policies are not material, as there is no necessity to go into equity for an apportionment of all the insurance moneys among all the losers. Souls v. Lowenthal, 186.

WATER METERS.

See **City of New York.**

WILL.

1. *A power of sale exercised of necessity does not convert realty into personality — Priority of payment of a bequest in lieu of dower and distribution — Interest chargeable to an executor — Unnecessary burial lot and monument — Transaction with a deceased person — Code Civ. Pro.*, § 829.—Where a lawyer, who drew his own will and thereby gave his executors a discretionary power of sale, devised to one of them, his widow, by the first item, certain

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WILL — Continued.

real estate absolutely, by the third item gave her in lieu of dower and distribution one-half of his personalty absolutely and the use of the other half for life, except such as was not otherwise disposed of by the will, and then made to others legacies out of the proceeds of the sale of his real estate amounting to nearly the full value thereof, the court considered it unreasonable to hold that the widow was under the third item entitled to any share in the proceeds of the real estate as personalty simply because the real estate had necessarily been converted into personalty in order to pay the legacies charged upon the land. Under such a devise and bequest to a widow, in lieu of dower and distribution, she is to be deemed a purchaser; and, although her legacy exceeds in value the rights she relinquished, she is entitled, as against the general and residuary legatees, to one-half of the personalty after deducting the debts and expenses of administration. Where an executor has closed his estate with reasonable diligence and has accounted for all the interest he has received on the fund, he cannot, in the absence of proof of fraud or that he used the moneys for his own purposes to his own profit, be charged with any more interest where there is no affirmative proof that he could have invested the moneys to better advantage. Where a testator has in his lifetime provided for himself a burial lot and monument, his executrix cannot be allowed the expense of procuring new ones. Where the surviving executor of the estate of the testator calls and examines an alleged debtor of the testator in order to show the liability and surcharge the account of the administrator of the widow, his former coexecutor, with the amount of the debt, the witness, although incompetent to testify to a personal transaction with the testator which would relieve the witness from liability, is entitled to give the whole transaction with the testator and show that he was not indebted to him. Matter of Woodbury, 143.

2. *Vesting — Suspension of the power of alienation — Second life estate indeterminable as to identity until the lapse of an intermediate life.*— A testator gave the use for life, of certain shares of stock, to his wife and to his married daughter equally and to the survivor of them. He further provided that if his son-in-law survived both he should have for life the use of the stock and the use of the homestead, "to be thereafter disposed of as herein provided". After the death of all he gave the shares of stock to certain persons and corporations. The widow has died. Held, that the remainder in the shares of stock vested at the testator's death, subject only to the life estates. That there was no suspension of the power of alienation for more than two lives in being. That the widow having died, the daughter was entitled to the income of all the stock; that at her death that one-half of the principal, whose income the widow had enjoyed, would go to the remaindermen, while the son-in-law would have for life the income of the other half. That the facts that it could not be determined, until one life had elapsed, in which one-half the son-in-law would have an interest, or as to which half his would be a third life estate, did not prejudice his right to income. Matter of Conger, 157.

3. *Trust — Executors when trustees by implication — Separate trusts — Implied imperative power of sale — Equitable conversion — Suspension of the power of alienation — Separate invalid trust cut off.*— Where a testatrix having thirteen nephews and nieces, gave and bequeathed her residuary estate, consisting of realty and personalty, to them in equal shares payable at the age of twenty-five, directed her executors to invest, in the meantime, the share of "each" in first-class securities, and, until each reached twenty-five years, pay the income to the testatrix' sisters, the court determined, in an executors' action to construe the will brought after two of the nephews and nieces had reached the age of twenty-five and had demanded payment of their legacies, first, that the executors were impliedly created trustees, up to the period of distribution, and of thirteen separate trusts; second, that by implication they had an imperative power of sale; third, that there was a consequent

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WILL — Continued.

equitable conversion of realty into personalty; and, fourth, that the said two legatees were entitled to present payment. A further provision of the will that "in case any of the said legatees die before reaching the age of twenty-five years then his or her share shall be distributed amongst the survivors on arriving at said age" was declared void, first, for suspending the power of alienation for a definite period of time and, second, for suspending it for more than two lives in being at the death of the testatrix. An invalid provision of a will may be cut off where it does not affect the primary purpose of the will and that purpose is valid. **Mendel v. Levis, 271.**

See **Devise; Domicile; Trusts.**

WITNESS.

See **Evidence.**

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